10-2023

Representations of Drug-Related Harms in Sentencing: Towards Evidence-Informed, Non-Stigmatizing Approaches

Niki Kiepek
Dalhousie University Schulich School of Law

REPRESENTATIONS OF DRUG-RELATED HARMS IN SENTENCING: TOWARDS EVIDENCE-INFORMED, NON-STIGMATIZING APPROACHES

by

Niki Catherine Kiepek

Submitted in partial fulfilment of the requirements
for the degree of Master in Laws

at

Dalhousie University
Halifax, Nova Scotia
December 2023

Dalhousie University is located in Mi'kma'ki, the ancestral and unceded territory of the Mi'kmaq. We are all Treaty people. We recognize that African Nova Scotians are a distinct people whose histories, legacies and contributions have enriched that part of Mi'kma'ki known as Nova Scotia for over 400 years.

TABLE OF CONTENTS

LIST OF FIGURES

ABSTRACT

This thesis explores how the concept of harm is constituted in case law pertaining to the importation, production, possession, and trafficking of drugs in Canada. A specific focus of analysis is whether judges accurately use empirical research to inform decisions. Drugs are understood as a social construct – encompassing psychoactive substances that are both legal and illegal – and as variably regulated in Canadian law.

I use critical discourse analysis to examine how harm is represented in case law (n=129), identify which sources influence legal discourses (e.g., past cases, expert testimony, empirical research), and analyze outcomes arising from how harm is constructed in case law. This approach indicates that normative use of moralization language silences certain knowledge sources and contributes to institutionalized stigma.

Recommendations for reform include incorporating critical reflectivity into judicial practices, accurately representing harm in ways that are non-stigmatizing, and improving research literacy skills.

LIST OF ABBREVIATIONS USED

CDA	Critical Discourse Analysis
CDSA	Controlled Drugs and Substances Act
CNS	Central Nervous System
CSO	Conditional Sentence Order
FC	Federal Court
FDA	Food and Drugs Act
FDR	Food and Drug Regulation
LSD	Lysergic Acid Diethylamide
MDMA	3,4-Methylenedioxy-Methamphetamine
MMP	Mandatory Minimum Penalties
NCA	Narcotics Control Act
SCC	Supreme Court of Canada
VANDU	Vancouver Area Network of Drug Users

ACKNOWLEDGEMENTS

I extend my appreciation to Professor H. Archibald Kaiser, my thesis supervisor, for your unfaltering dedication to my success. Your careful, comprehensive feedback combined with a passionate conviction for the law (and what the law could be) pushed me to delve deeper into the field of legal scholarship. Your kindness and caring created a learning environment where risks could be taken. I am also indebted to Professor Sheila Wildeman who instilled in me a fascination for jurisprudence. Your passion for justice shines through in all areas of your work, inspiring others to think critically. I thank Professor Matthew Herder for undertaking the role of external reviewer. The breadth of your knowledge in legal scholarship and empirical research is invaluable. I further extend my appreciate to Professor Richard Devlin, Glenn Anderson, and Anne Matthewman for the expert knowledge you shared through your courses, which introduced me to fundamental legal education as part of the Master in Laws. I am grateful to everyone in the Schulich School of Law for creating a collegial and welcoming environment, which inspires deep contemplation and actions towards social reform.

CHAPTER 1 INTRODUCTION

1.1 PURPOSE

The intention of this thesis is to analyze how the concept of harm is constituted in case law pertaining to the importation, production, possession, and trafficking of drugs in Canada using critical discourse[1] analysis (CDA) methodology. In this analysis about how harm is constructed[2] in case law, a specific focus is the extent to which judges accurately use empirical research[3] to inform their decisions. This project is philosophically grounded in the notion that use of language is not a simple process of sharing information neutrally; rather, *how* language is used functions to convey and construct meanings.

I begin this thesis by situating judicial sentencing as a socially embedded discursive practice.[4] In judicial decisions,[5] judges ideally summarize details about the factors considered, provide a reasoned interpretation of sentencing principles and relevant legal theory pertains to the individual case, and explain the rationale for their decision. Judicial decisions are part of the public record and *how* language is used has broad societal impacts. Although decisions are not routinely accessed by the average Canadian, they hold privileged authority and legitimacy and may be cited as precedent for future cases. In public and political forums, decisions may be reported and cited in the popular press, in legislature, when developing policy and regulations, and even in crime fiction.

---

[1] Haig Bosmajian defines discourse as: "not simply talk itself but also the way that something gets talked about" in Haig A Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale: Southern Illinois University Press, 1992) [Bosmajian, "Metaphor and Reason"].

[2] From a social constructionist epistemology, language is understood to be "not merely a mode of representing but also a means of constituting reality" (see Elissa Foster & Arthur Bochner, "Social Constructionist Perspectives in Communication Research" in James A Holstein & Jaber F Gubrium, eds, *Handbook of Constructionist Research*, (New York: Guilford Press, 2008) 85 at 86. Foster and Bochner elaborate, "all attempts to speak for, or represent other people's lives necessarily are partial, situated, and mediated activities of creating value and inscribing meanings" at 87. They explain that discourse holds the potential for transformation and change regarding how people within society think and how people act. Research informed by constructionist inquiry needs to attend to social processes, of which use of language in one such process.

[3] I use the term empirical research to indicate any systematic process of collecting an analysing information. This encompasses qualitative, quantitative, decolonizing, and Indigenous methodologies.

[4] Note that the presentation of empirical research is also a socially embedded discursive practice.

[5] Note: In this thesis, both written decisions and transcribed oral judgments are included.

In the introduction, I present judicial decisions as a distinct discursive genre.[6] Throughout society, the use of language varies, depending on the setting. In the field of linguistics, genre pertains to the way that language can be used in distinct ways that serve "specific communicative functions."[7] Genre produces implicit or explicit "templates for communicative action, linear processes unfolding over time."[8] For instance, in courtrooms, there are rules that govern who can speak, when, and what type of information can be shared by each person and in what format, depending on their role. Alternatively, the structure and content of a peer-reviewed journal article differs from a textbook, a novel, a policy brief, or a newspaper article. Judicial decisions are expected to follow a particular format and to include (and exclude) certain types of information in distinct ways.[9]

For the purpose of this thesis, the focus of analysis differs from a doctrinal analysis, which is more likely to offer a systematic, descriptive and interpretative, legal critique of a defined body of law.[10] Instead, CDA seeks to understand topics such as how power is enacted through language, how concepts are constructed through language, how people are represented, and so on. It is not my goal to opine on the appropriateness of legal

---

[6] This aligns with other scholarship, such as Vijay K Bhatia, *Worlds of Written Discourse: A Genre-Based View* (London: Continuum, 2004). Allan Durant & Janny H C Leung, *Language and Law: A Resource Book for Students*, 1st ed. (London: Routledge, 2017) at 11 explains, "in law specific genres serve precisely defined roles: they may prohibit something; impose duties or obligations; make promises; impose an order; advocate a course of action; or report the reasoning or findings of a court" [Durant].

[7] Theo van Leeuwen, "Multimodality" in Deborah Tannen, Heidi E Hamilton & Deborah Schiffrin, eds, *The Handbook of Discourse Analysis* (Oxford: Wiley Blackwell, 2018) 448 at 454.

[8] *Ibid* at 457.

[9] See *R v Sheppard*, 2002 1 SCR 869, 2002 SCC 26, 2002 1 RCS 869, 2002 SCJ No 30, 2002 ACS no 30, where it is determined that it is an error in law for a judge to fail to provide a clear, transparent, accessible account of the legal reasoning that led to their decision. This decision continues to influence cases. It has further been clarified in *R v REM* that "a logical connection between the verdict and the basis for the verdict must be apparent," but "The judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties," in *R v REM*, 2008 SCJ No 52, 2008 SCC 51, 2008 3 SCR 3, 2008 3 RCS 3, 235 CCC (3d) 290, 83 BCLR (4th) 44, EYB 2008-148153, JE 2008-1861, 2008 11 WWR 383, 260 BCAC 40, 60 CR (6th) 1, 380 NR 47, 2008 CarswellBC 2037, 79 WCB (2d) 321, 297 DLR (4th) 577 [*R v REM*] at para 35, 19.

[10] Theunis Roux, "Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour" (2014) 24 Legal Educ Rev 177; Mark van Hoecke describes, "legal doctrine is a scientific discipline in its own right…. we may consider it as a mainly hermeneutic discipline, with also empirical, argumentative, logical and normative elements. Description of the law is closely linked to its interpretation and, when describing the law, the legal scholar is wording hypotheses about its existence, validity and meaning. The level of systematisation and concept building is the level of theory building in legal doctrine" in Mark van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 1st ed (Oxford: Hart Publishing, 2011) at 17.

decisions or the justness of sentences. My goal is to explore disciplinary constructions of harm and what Maxine Greene refers to as the *cloud of givenness*: "It is the cloud of givenness, of what is considered 'natural' by those caught in the taken-for-granted, in the everydayness of things."[11] As a social scientist and health researcher, I focus my analysis on the discursive construction of drug-related harm in judicial decisions. This thesis is written at a time in Canadian history when the criminalization of drugs is increasingly contested and some jurisdictions have moved, at least temporarily, to decriminalization.[12] To facilitate critical analysis, I present a summary of contemporary literature around drugs as a broad social construct and an overview about how drugs are variably regulated in Canadian law. I conclude the introduction by describing contemporary discussions around the regulation of drugs nationally and internationally.

Following the introduction, I describe CDA methodology and outline the project methods. In the findings, I explore how harm is variably constructed by judges through selective citations of previous cases, expert testimony, and/or empirical research. My conclusion is that language used in judicial decisions predominantly, though not exclusively, reflects moralizing judgements about controlled drugs as inherently harmful while people who traffic in drugs are portrayed as directly causing and perpetuating societal harms. Assumptions about inherent or relative harms of drugs and, sometimes, empirical research and/or expert testimony, are used to substantiate the judge's legal reasoning around sentencing principles. Citation of previous cases predominantly serves as decisive evidence, while accurate, comprehensive use of scientific knowledge and reasoned interpretation of empirical evidence is largely absent.

---

[11] Maxine Greene, *Releasing the Imagination: Essays on Education, the Arts, and Social Change* (San Francisco: Jossey-Bass, 1995) at 47.

[12] The Canadian Centre on Substance Use and Addiction defines criminalization, decriminalization, and legal regulation (or legalization) as follows: "Criminalization: Production, distribution and possession of a controlled substance are subject to criminal sanctions, with conviction resulting in a criminal record. Decriminalization: Non-criminal responses, such as fines and warnings, are available for designated activities, such as possession of small quantities of a controlled substance. Legalization: Criminal sanctions are removed. Regulatory controls can still apply, as with alcohol and tobacco"; Rebecca Jesseman & Doris Payer, "Decriminalization: Options and Evidence" (June 2018), online: *Canadian Centre on Substance Use and Addiction* <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Decriminalization-Controlled-Substances-Policy-Brief-2018-en.pdf> [perma.cc/4KLK-KC4E].

One implication of this thesis is that it confronts the quality of sources that are cited by judges to validate their interpretation about the harmfulness of drugs. Recommendations for practicing evidence-informed law are discussed. A second implication arises from the presence of highly moralized language, which I conclude contributes to institutionalized stigmatization of people who use and/or distribute drugs. I argue that judges have a social and professional responsibility that extends beyond determining a just and appropriate sentence and involves upholding the equal worth and dignity of all Canadians.[13] Judicial attitudes are conveyed in judicial decisions based on what information is included (or excluded) and how the information is conveyed.[14] The use of language in written decisions is *not* an inherently neutral process. I argue that as members of society in privileged positions of power and whose words hold legitimacy and authority, judges have an ethical responsibility to conscientiously consider how they are social actors embedded within broader social discourses and to acknowledge the direct and indirect ways they contribute to public understandings about legal concepts and about citizens who engage in criminalized conduct around drugs.

1.1.1 Positionality Statement

Positionality statements are common practice in social and health science scholarship.[15] I am a university educated occupational therapist and identify as a White, female, able-

[13] Canadian Judicial Council "Ethical Principles for Judges" (June 2018), online: <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> [perma.cc/P3JL-QJDY] ["Ethical Principles for Judges"].

[14] As will be discussed further, judicial decisions form a unique genre of discourse, which shapes and influences the type of information provided and the format. Within these parameters, how judges use language to convey and construct meaning is inherently individualized.

[15] Providing a positionality statement aligns well with the epistemological approach of this thesis, grounded on the proposition that language is not value-free, and a thesis is a form of discourse. A positionality statement is an articulation of a person's socially and politically situated worldview. Andrew Gary Darwin Holmes describes, "The individual's world view or 'where the researcher is coming from' concerns ontological assumptions (an individual's beliefs about the nature of social reality and what is knowable about the world), epistemological assumptions (an individual's beliefs about the nature of knowledge) and assumptions about human nature and agency (individual's assumptions about the way we interact with our environment and relate to it)" in Andrew Gary Darwin Holmes, "Researcher Positionality – A Consideration of Its Influence and Place in Qualitative Research – A New Researcher Guide" (2020) 8:4 Shanlax Intl J Ed 1 at 1.

bodied, economically secure, second generation Canadian from working class[16] background. I am an Associate Professor at the Dalhousie University School of Occupational Therapy and received my PhD in Health Professional Education from Western University. I worked as an Occupational Therapist and Addiction Counsellor for approximately ten years. Since 2008, I have conducted research about drug use from medical and social perspectives using diverse methods, such as interviews, surveys, photo elicitation, CDA, and ecological momentary assessment.[17] Through the Dalhousie Master of Laws program, I learned about legal research and writing, mental health law, science and the law, and jurisprudence.

In social science methodology, it is important that researchers situate themselves as active participants in the analytical process. As an outsider to the practice of law, I have not been socialized to law in the same way as legal scholars or law professionals and I do not have the same technical knowledge. I do not personally use controlled substances and have not been a subject of the criminal law. I approach law as a social practice embedded in – not isolated from – Canadian society.

1.2 JUDICIAL DECISIONS

In this section, I explore judicial decisions as a feature of case law. In section 1.2.1, I present an overview of judicial decisions as a form of socially embedded discourse. In section 1.2.2, I describe judicial decisions as a distinct discursive genre. Section 1.2.3 introduces the performative nature of judicial decisions. Finally, section 1.2.4 examines the place of judicial decisions in the discursive construction of crime and criminality.

---

[16] In Merriam-Webster Dictionary, working class is defined as "the class of people who work for wages usually at manual labor"; Merriam-Webster, "Working Class" (2023) online: <https://www.merriam-webster.com/dictionary/working-class>

[17] For example: Kiepek, Niki & Brenda Beagan, "Substance Use and Professional Identity" (2018) 45:1 Contemporary Drug Problems 47; Kiepek, Niki & Christine Ausman, "'You are You, but You are Also Your Profession': Nebulous Boundaries of Personal Substance Use" (2023) 50:1 Contemp Drug Prob 63; Kiepek, Niki, et al, "'A Reward for Surviving the Day': Women Professionals' Substance Use to Enhance Performance" (2022) 10:2 Performance Enhancement & Health 100220; Kiepek, Niki, et al., "Socially Situated Experiences of Substance Use: A Photo Elicitation Pilot Study" (2023) SAGE Open; Kiepek Niki, et al., "Substance Use by Social Workers and Implications for Professional Regulation" (2019) 19:2 Drugs Alcohol Today 147.

1.2.1 Judicial Decisions as Socially Embedded Discourse

It has been argued that "law is, fundamentally, a discursive phenomenon.[18] Law cannot be separated from legal discourse because it is generated, enforced, contested, reproduced, and transformed centrally through language."[19] From this perspective, legal practice becomes understood a "contestation over the legitimacy of competing representations of reality."[20] Of particular interest in this thesis are judicial decisions. While it is well beyond the scope of this thesis to thoroughly examine the role of judges, aspects of the role that relate specifically to their decisions as socially embedded discourse will be touched upon in the following subsections: Law and the Judiciary as Socially Embedded (1.2.1.1) and Judges, Values, and Ideology (1.2.1.2).

1.2.1.1 Law and the Judiciary as Socially Embedded

Law is a product of society, not a phenomenon that can be separated or severed from the minds and actions of people. Anya Bernstein describes law as a "a social phenomenon that both reflects and affects the society that produced it"[21] and "as a social product: shot through with cultural forces and exerting social effects."[22] This perspective that law is inseparable from the social and political is shared by other legal theorists, such as William A. Bogart who said:

> law, whatever its origins, is fundamentally connected to the social and political life from which it arises and which, in turn, it seeks to influence… That obvious proposition is frequently thrust into the background or just plain ignored when we

[18] Durant, *supra* note 6 at 13 lists three categories of legal texts: "'legislative' documents (e.g. treaties, constitutions, statutes, statutory instruments, by-laws (sometimes 'bye-laws'), regulatory codes), 'private law' documents (e.g. contracts, orders, deeds, wills, leases, conveyances, mortgage documents, building contracts), and 'procedural' documents (e.g. opening speech in a trial, cross-examination, summing-up speech, jury direction)." They note that each type of discursive text serves specific legal tasks; legislative and private law documents are typically through written genres whereas procedural documents are often through spoken and written language.
[19] Matthew Mitchell, "Analyzing the Law Qualitatively" (2023) 23:1 Qual Research J 102 at 108 [Mitchell, "Analyzing the law Qualitatively"].
[20] *Ibid,* at 109.e
[21] Anya Bernstein, "Saying What the Law Is" (2023) 48:1 Law & Soc Inquiry 14 at 14.
[22] *Ibid,* at 15.

> begin to speculate about the role of law – particularly a role for the law that comes to us from the judges in Canada.[23]

When describing the role of the courts in society, Shimon Shetreet declared:

> Courts often make decisions which shape the life of the community and crystallize social norms, political philosophies, and human commitments into binding law. Along with the other branches of government, the courts take part in the political process of governing the people. This is an aspect which judges do not often admit. The judiciary plays an important role in society.[24]

In the preceding quote it is observed that case law produced by the judiciary is viewed as a place where the law and the political intersect. It is similarly purported,

> Judges, when handing down judgments, enjoy a 'relative sovereignty', being always already inscribed into the institutional imperatives of the juridical, on one hand, and ideological influences, on the other, but at the same time called upon to decide in the terrain of the undecidable and contingent (after all, law does not 'apply itself' on its own).[25]

This means that the decisions that judges make require individual interpretation. In such contexts, it becomes evident that judicial decisions "help create the framework of law."[26]

Through their interpretation of law, the judiciary contributes to shaping what forms of conduct are condoned – even when an act has resulted in a criminal charge – and, if a sentence is to be imposed, the suitability of a given penalty. Lord Thomas of Cwmgiedd notes a fundamental aspect of the judicial system is that "decisions are made available to all citizens so they can plan their lives on the basis of the law."[27] Decisions articulated in an individual case may later be considered in future cases when similar factors or questions are presented; thus, the deliberations in one case (particularly decisions made in

---

[23] William A Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) at ix [Bogart].
[24] Shimon Shetreet, "On Assessing the Role of Courts in Society" (1980) 10:4 Man LJ 357 at 357.
[25] Rafał Mańko, "Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication" (2022) 33:2 L Critique 175 at 175 [Mańko].
[26] Lord Thomas of Cwmgiedd, "The Centrality of Justice: Its Contributions to Society and its Delivery" in Jeremy Cooper, ed, *Being a Judge in the Modern World: A Collection of Lectures from Some of the Most Eminent Judges and Legal Commentators in the UK and Beyond* (Oxford: Oxford University Press, 2017) 149 at 154.
[27] *Ibid,* at 156.

the higher courts)[28] may influence decisions in future cases. Decisions of lower courts within society, and within the judiciary, should not be underestimated, as described by Rafał Mańko:

> Decisions of lower courts… contribute to the development of a certain line of case-law, a practice of deciding cases of the same or similar kind (at least in the same court, or by the same judge) …. even if legally speaking it is not a binding precedent, it can nonetheless give rise to a habit of deciding similar cases similarly, and therefore gain significance extending beyond the original, individual litigation at its origin."[29]

It has been argued that a "key function of the judiciary is to preserve and protect the existing social order, to underpin the stability of the system of government and to resist any attempts to change it."[30] There are variable opinions in legal scholarship regarding the extent that judges can or should be involved in reforming law and, directly or indirectly, advocating for policy changes through their decisions in individual cases.[31] The juridical is considered distinct from politics, with respect to "different principles of decision-making (democratic voting vs. legal reasoning), different procedures (parliamentary debate vs. court hearing), and different outcomes (political decisions vs. judgments in individual cases)."[32] However, both the legal and the political contend with the same types of societal issues and conflicts. Karl Klare proposes:

> the boundary between law and politics is both indistinct (so that it is sometimes difficult to know whether we are on legal or political terrain) and porous (so that politics sometimes sneaks under the radar to trespass on law's territory). All sophisticated legal theorists acknowledge a degree of indeterminacy in legal reasoning, so that sometimes adjudicators refer to, or are subtly influenced by, extralegal values and assumptions.[33]

---

[28] i.e., Appeals courts; Supreme Court of Canada
[29] Mańko, *supra* note 25 at 186-187.
[30] Sally Taylor, "Deconstructing Imprisonment: Exploring Sentencing Discourses in the District Court of New South Wales" (2022) Criminology & Crim Just 174889582211179 at 3 [Taylor].
[31] Judges are expected to conduct themselves in ways that convey impartiality, "both in and out of court" as stated in "Ethical Principles for Judges", *supra* note 13 at 27. Yet, the influence of judges in Canadian society extends beyond the court. As Wayne MacKay argued, "The role of the judge in Canada has evolved to the point where judges have become significant policy-makers, and Canadians have a right to know their views on the issues of the day" in Wayne MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen But Not Heard?" (1993) 3 NJCL 159 at 159.
[32] Mańko, *supra* note 25 at 180.
[33] Karl Klare, "The Politics of Duncan Kennedy's Critique" (2001) 22 Cardozo Law Rev 1173 at 1176.

Although the judiciary is purported by some to be "ideology-free, depoliticised and neutralised …. this closure is never full or perfect— this extant, remaining part of the political which escapes the attempt at closure is conceptualised as the question of 'indeterminacy.'"[34]

Legal interpretation is inherently a social embedded practice, and as such "Legal interpretation without any ideological influence is a fiction which has never existed and will never exist."[35] Adjudication, through the process of legal interpretation, can be viewed as "a field of interplay of a whole array of ideologies, including especially neoliberalism, (religious) conservatism, nationalism, but also socialism, socialist democracy or communism."[36] In their roles, Canadian judges have a level of discretion, "and therefore the judge's freedom to take a 'sovereign' politico-judicial decision, is a question of degree, rather than one of an all-or-nothing distinction… judges function within law as a 'medium' which, on one hand, empowers them but, on the other hand, limits them."[37] The decisions made, the rationales provides, and interpretations of legal theories directly or indirectly "send out ideological messages, not so much about any particular case or group of cases but to reinforce particular sets of values."[38]

It is argued that "political conflicts do not come to an end when legislation is enacted, but they continue in the courtroom."[39] Some theorists contest the framing of the judge's role as purely 'non-political,' noting the role of judges as embedded social practices. John Noonan & Kenneth Winston argue that judges decisions contribute to "the realization of the community values" and note: "the half explanatory, half apologetic reference to the judge's subservience to the law is at best a playful protective device; at worst it testifies to his unwillingness to understand his own role in the social process."[40]

---

[34] Ibid.
[35] Mańko, *supra* note 25 at 183.
[36] Mańko, *supra* note 25 at 182.
[37] Mańko, *supra* note 25 at 181.
[38] Bogart, *supra* note 23 at 64.
[39] Mańko, *supra* note 25 at 176.
[40] John T Noonan, & Kenneth I Winston, *The Responsible Judge: Readings in Judicial Ethics* (Westport: Praeger, 1993) at 55.

Personally held beliefs about what constitutes societal goals are influenced by values and ideology and have the potential to influence the weight attributed during processes of legal reasoning. In criminal law, says John Hogarth:

> Some people would argue that the rehabilitation of convicted offenders is the best method of preventing crime. There are others who believe that it is the deterrent effect of criminal sanctions that offers the greatest protection. Still others maintain that the detention of dangerous or anti-social offenders is the only guarantee that they will not commit further crime, at least during the period of custody. Finally, there are those who feel that criminal sanctions find their justification, not in the prevention of crime, but rather in an alleged moral right and duty invested in the courts to inflict punishment on convicted offenders as an expression of society's disapproval of their crimes.[41]

Despite the articulation of shared sentencing principles, in Section 718 of the *Criminal Code*,[42] judges may differ in the importance they attribute to each principle in individual cases, which is discussed more in section 1.2.1.3.

Judges are in privileged positions. Consequently, their perspectives about what is a just or right outcome has direct impacts on others. In this way, "The judiciary holds an especially powerful role in the communication of these [and other] values, serving as 'moral entrepreneurs' and 'public discourse leaders' on crime and justice."[43] As members of society, judges are embedded in social discourses, where their perspectives both shape and are shaped by the public.

As noted, it is important to understand that the implications of judicial decisions are not confined to specific cases, but have wide reaching influence and can become a part of the public discourse. One way this can occur is through direct citation of cases in popular media. For instance, *Ellis*[44] was reported by Andrea Woo in the Globe and Mail:

> Judges with British Columbia's highest court have reserved a decision on whether a suspended sentence for a woman convicted of selling small amounts of fentanyl is reflective of a shift in attitudes and understanding of substance use, or akin to the

[41] John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971) [Hogarth] at 3.
[42] *Criminal Code,* RSC 1985, c C-46, s 718 to 718.2.
[43] Taylor, *supra* note 30 at 3.
[44] *R v Ellis*, 2022 BCJ No 1509, 2022 BCCA 278, 2022 WCB 1356, 417 CCC (3d) 102, 82 CR (7th) 223, 2022 CarswellBC 2224 [*Ellis 2022*].

> court throwing its hands up on the issue of drug crimes[45] …. In her written decision, Justice Flewelling said there has been a shift in societal and judicial attitudes and understanding about drug addiction that allowed her to revisit the sentencing range established in the B.C. Court of Appeal[46] … "I am imposing a sentence that will assist Ms. Ellis in her desire to associate with healthy people, learn other skills and tools that will assist her in managing her illness but, most importantly, assist her in realizing that she is a valuable and contributing member of this community," she said.[47]

The Canadian public are thus made aware of legal reasoning and – in this story – an interpretation of that decision from a particular public perspective. This supports the opening observation that law is "a social product."[48]

Law is both a discursive and embodied practice. Haig Bosmajian explains, "In the context of law, discourse in the linguistic sense refers to the talk that constitutes courtroom testimony, closing arguments, lawyer-client interviews, arguments between disputants, mediation sessions, and the like."[49] This idea will be more fully developed in section 1.2.2. Adjudication, specifically, involves "the on-going production and evolution of case-law, which is (just like 'democratic agonistic play') 'permanently contingent' … being 'an essentially unstable discursive structure.'"[50] Simply said, meanings can be interpreted and re-interpreted, which can change how laws are understood, enacted, and enforced. Lord Justice Laws describes this process accordingly:

> To the extent that the words of an Act do not dictate its interpretation – a statute very seldom can take in all cases – it is necessarily so. Interpretation is supposedly the servant of Parliament's will. But it is an autonomous creative process…. It is not just a matter of filling the gaps which the legislature would itself have filled, if the legislators had thought about it. The translation of words on a page into what should have been done or not done is an autonomous creative process. Words on a page only come to life when they are interpreted; and more often than not there is more than one possible interpretation. Not only because there are gaps; but because that is the nature of language[51]

---

[45] Andrea Woo, "B.C. Court Hears New Appeal in Fentanyl Trafficking Case" (26 May 2022) at para 1, online: Globe and Mail <https://www.theglobeandmail.com/canada/article-bc-court-hears-new-appeal-in-fentanyl-trafficking-case/> [perma.cc/48FL-4VH7].
[46] *Ibid* at para 17.
[47] *Ibid* at para 18.
[48] Bernstein, *supra* note 21 at 15.
[49] Bosmajian, "Metaphor and Reason", *supra* note 1 at 8.
[50] Mańko, *supra* note 25 at 179.
[51] Lord Justice Laws, "Should Judges Make Law?" in Jeremy Cooper, ed, *Being a Judge in the Modern World: A Collection of Lectures from Some of the Most Eminent Judges and Legal Commentators in the*

When one views law as a discursive phenomenon, the influence of the judge becomes even more apparent and it can be seen that "judges do make law."[52]

In this section, the law and role of the judiciary were presented as embedded discursive practices; both influenced by and having an influence on the thoughts and actions of others.

1.2.1.2 Judges: Values, Ideology, and Power

Ideology is "a system of enforceable rules governing social relations and legislated by a political system."[53] As an ideology, law is considered to direct subjects in ways that are not transparent, which "cloaks power."[54] Critical perspectives about ideology and law attend to both the ways in which sociological and political factors impact law and the ways that law impacts society.[55] Legal theorists and judges themselves vary in the extent to which they openly discuss their perspectives about the extent to which individual values and ideology influence decisions.[56] For instance, it is reported that in 1986, "Justice Chouinard stated: 'I don't think it's difficult [to keep my personal opinions out

---

UK and Beyond (Oxford: Oxford University Press, 2017) 199 at 201-202. In *R v Alex,* 2017 1 SCR 967, 2017 SCC 37, 2017 1 RCS 967, 2017 SCJ No 37, 2017 ACS no 37 at 24, the SCC asserts:

> The modern approach to statutory interpretation is now well established. It requires that the words of a provision be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v Rex*, 2002 2 SCR 559, 2002 SCC 42, 2002 2 RCS 559, 2002 SCJ No 43, 2002 ACS no 43 at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

[52] *Ibid* at 109.

[53] Stanford Encyclopedia of Philosophy, "Law and Ideology" (22 February 2001; revised 23 April 2019), para 1, online: <https://plato.stanford.edu/entries/law-ideology/> [perma.cc/Z5AH-LGRK].

[54] *Ibid*, at para 3.

[55] *Ibid.*

[56] Values is a broad concept, but generally refers to individual "standards for judging all kinds of behavior, events, and people." See Shalom H Schwartz, et al, "Basic Personal Values Underlie and Give Coherence to Political Values: A Cross National Study in 15 Countries." (2014) 36:4 Polit Behav 899 at 903. This is distinct from collective "values," such as those that form the "normative foundation" for judicial systems: impartiality, independence, accountability, representativeness, transparency, and efficiency. Adam Dodek & Richard Devlin also include federalism as a value. See Adam Dodek & Richard Devlin, "'Fighting Words: Regulating Judges in Canada" in Richard Devlin, & Adam Dodek, eds, *Regulating Judges: Beyond Independence and Accountability* (Cheltenham: Edward Elgar Publishing, 2016) 76 [*Dodek*] at 76; Ideology is defined as "a body of ideas, a philosophy, or an outlook" that influence individual values by Bosmajian, "Metaphor and Reason," *supra* note 1 at 121.

of decision making] but it is an absolute must, there's' no doubt about that." Justice Lamer, on the other hand, said "I'm called to make value judgments and I'm not going to make value judgements with somebody else's values."[57]

Research about sentencing outcomes indicates "the importance of [analyzing] not just the facts of the case, but how they are perceived by the judges within the broader context of their sentencing philosophy (Hogarth, 1971)."[58] The ability for judges to entirely separate themselves from their personal values when deciding cases has been contested, as evidenced in research about the outcomes of sexual assault cases and the over-representation of distinct populations in prisons (e.g., Indigenous women).[59] Beyond the facts of the cases, judges are influenced by "the dominant legal objectives they espoused (e.g., rehabilitation, general deterrence, public protection)."[60] In research designed to examine sentencing disparity, findings showed that a judge's subscription to legal objectives was the "most potent predictor of sentence severity," followed by differences in how judges considered case facts.[61] One interpretation was that judges appear to "rework the facts of the case to justify their decision. What might be seen as an aggravating factor by one judge was viewed as a mitigating or neutral factor by another."[62]

Such observations are not critiques about how judges fulfill their roles, per se; rather, these critiques foster critical reflection on claims of neutrality. Allan C. Hutchinson contests, "it has never been possible for judges to fulfil their responsibilities in a neutral or non-political way… More than that, neutrality is not even a desirable or healthy ideal in a society which aspires to be truly democratic." He elaborates:

> it is mistaken to insist that [judges] must be or even can be completely free of ideological predispositions and political values … judges make their decisions

---

[57] Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) at 88.
[58] Scott Macdonald, Patricia Erickson & Barbara Allen, "Judicial Attitudes in Assault Cases Involving Alcohol or Other Drugs" (1999) 27:3 J Crim Just 275 at 276 ["Judicial Attitudes"]. Here, 'sentencing philosophy' appears to align with John Hogarth's analysis of 'judicial attitudes,' which is discussed more below. See Hogarth, supra note 41 at 276.
[59] Dodek, *supra* note 56.
[60] "Judicial Attitudes", *supra* note 58 at 276.
[61] Palys, T S & Stan Divorski, "Explaining Sentence Disparity" (1986) 28:4 Can J Criminology 347 at 357.
[62] "Judicial Attitudes", *supra* note 58 at 276.

> because of, and not in spite of, their values and perspectives. Legal rules and principles are not unimportant nor are they irrelevant to any decision made, but they are never determinative in their own right and are never outside the play of political power. Accordingly, the identity and social vision of the judge is crucial. Insofar as we continue to turn to courts on issues of social justice, it is vital that more attention be paid to the ideological make-up of judges and that the myths of judicial objectivity and neutrality be exploded. There is no place to which judges may escape to make impersonal and strongly detached judgments - especially not the illusory ground of Law itself.[63]

Recognizing that the judiciary is socially embedded and influenced by values, ideology, and power structures is a starting point for enacting critical reflexivity.[64] From a legal perspective it is argued, "If independence or neutrality is to mean anything, it must mean a recognition of one's own predispositions and a constant willingness to re-interrogate them."[65]

The concept of judicial attitudes has been used to explore how judges evaluate cases before them. John Hogarth explains:

> Judicial attitudes in sentencing are a set of evaluative categories, relevant to the judicial role, which the individual magistrate has adopted (or learned) during his past experience with persons, problems, or ideas in his social world…. The evaluations consist of beliefs about and feelings towards the issues involved, as well as dispositions to respond to them in positive or negative ways.[66]

In his research, Hogarth found, "While it appeared that there were wide variations in penal philosophy among magistrates, it was also evident that individual magistrates had a fairly consistent and coherent set of beliefs bearing on their penal philosophies. While magistrates were inconsistent with each other, they were consistent within themselves."[67]

---

[63] Allan C Hutchinson, "Towards Judicial Accountability - Are the Excuses Getting Lamer?" (1996) 45 UNB LJ 97 at 100 [Hutchinson].

[64] Critical reflexivity involves personal reflection for the purpose of transformation. Paulo Friere's work aligns with a commitment to critical reflectivity: "People develop their power to perceive critically *the way they exist* in the world *with which* and *in which* they find themselves; they come to see the world not as a static reality but as a reality in process, in transformation" in Paulo Freire, *Pedagogy of the oppressed*, translated by M B Ramos (New York: The Continuum International Publishing Group Inc, 1970/2007) at 12. Although critical reflexivity is increasingly promoted among people in positions of power, such as researchers, educators, and health care professionals, it is equally important that people who experience oppression critically reflect on how power is enacted and how inequities are perpetuated.

[65] Hutchinson, *supra* note 63 at 99.

[66] Hogarth, *supra* note 41 at 100-101; In this text, Hogarth uses the term 'magistrate' instead of 'judge,' but the terms are synonymous.

[67] Hogarth, *supra* note 41 at 361.

Indeed, "Hogarth found it was easier to predict the sentence by knowing the identity of the judge than by knowing the facts of the case."[68] Such acknowledgements that judges each bring their own understandings about what is right and just and knowing that these beliefs impact legal interpretations, it is proposed that the judicial system can be adapted or reformed in ways that minimize sentencing disparity and do not require legislative determination; as opposed to unrealistic expectations that judges can and should practice in ways that are somehow more neutral.[69]

It is argued that judges enact ideological stances, "whether consciously or not."[70] Benjamin N. Cardozo stated:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[71]

According to such views, "Adjudication cannot, therefore, be treated as an 'ideology-free' phenomenon."[72] Failure to acknowledge "the deeper and less obvious ideological orientation of the judges […] is the cause for critical concern and the object of civic improvement."[73] Hutchinson notes that representations of neutrality are "all the more

---

[68] David Cole & Julian V Roberts, "Sentencing in Canada: Current Issues and Concluding Thoughts" in David Cole & Julian V Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 390 at 402.
[69] Hogarth, *supra* note 41 at 348; Hogarth found, "there are enormous differences among magistrates in nearly every aspect of the sentencing process. Magistrates differ in their penal philosophies, in their attitudes, in the ways in which they define what the law and the social system expect of them, in how they use information, and in the sentences they impose. In a variety of ways it was demonstrated that magistrates interpret the world selectively in ways consistent with their personal motivations and subjective ends" (at p. 385-386). He also found that judges used information "in highly individual ways" (at 394).
[70] Susan Urmston Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (New York: Oxford University Press, 1998) at xiii [Philips].
[71] Benjamin N Cardozo, *The nature of the judicial process*. (London: Yale University Press, 1949) at 12-13.
[72] Mańko, *supra* note 25 at 184.
[73] Hutchinson, *supra* note 63 at 98.

effective because it comes in the trappings of the objective and the obvious. It is the taken-for-granted partial ground on which they take their impartial stands."[74]

The values and ideologies of judges are discursively embedded in law in countless ways. One example is in how concepts are represented through the use of language. This is discussed in more detail in section 1.3.3. Notably, it is observed, "the legal ideological stances that judges take… are implicit and hidden partly because of the intertextual[75] and

---

[74] Hutchinson, *supra* note 63 at 99. Forming a judicial decision based on ideology can sometimes be interpreted as bias. In the Canada Supreme Court Reports, Part 1 Vol 3 [1997] 3 SCR. 3-211 at 29, the concern of judges' opinions unduly impacting decisions is described:

> In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence."

Bastarache J. opined In *Arsenault-Cameron v Prince Edward Island*, 1999 3 SCR 851, 1999 3 RCS 851, 1999 SCJ No 75, 1999 ACS no 75 at para 3: The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated (R. v. S. (R.D.), [1997] 3 S.C.R. 484, at paras. 112 and 113)." He cited Cory J. in S (RD), at para. 119:

> The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

[75] Julia Kristiva coined the term intertextuality to convey that the "internal dimension of the text is connected to its external context" in Julia Kristeva, "Europhilia, Europhobia" (1998) 5:1 Constellations: Intl J of Crit & Democratic Theory at 324 [Kristeva]. Kristeva's work builds on the work of Bakhtin, who wrote:

> Language … lies on the borderline between oneself and the other. The word in language is half someone else's. It becomes "one's own" only when the speaker populates it with his own intention, his accent, when he appropriates the word, adapting it to his own semantic and expressive intention. Prior to this moment of appropriation, the word does not exist in a neutral and impersonal language … but rather it exists in other people's mouths, in other people's contexts, serving other people's intentions: it is from there that one must take the word, and make it one's own.

See, Mikhail M Bakhtin, *The Dialogic Imagination* translated by C Emerson & M Holquist (Austin: University of Texas Press, 1981/2008) at 293.

indexical[76] nature of the construction of meaning in discourse."[77] This means that the use of citations in text and talk permits the judge to claim a sense of neutrality; particular standpoints that are portrayed as cited *law*, not opinion. This masks the deliberateness with which decisions that are made, such as which interpretations to include in the judicial record and which to exclude (potentially silencing legitimate counter-positions). Bernstein observes, "What may seem like an inert text—law on the books—turns out to be a sociocultural microcosm."[78]

It is argued that "Legal texts are prescriptions born of normative convictions, so it should not be surprising to find little value neutral ground in them."[79] Rafał Mańko posits that reading of legal text in particular is influenced by hegemonic ideology, explaining:

> Doubtless, the ideological impact upon adjudication need not be the result of a judge's conscious decision ... More often than not, ideology impacts judicial decision-making unconsciously. This is because the hegemonic ideology 'represents common sense understanding of the world and elementary principles of morality', 'directs the judicial sense of justice and provides it with a sense of the relative weight of conflicting arguments' (Collins 1988, p. 67). Therefore judges, when engaged in legal interpretation, consciously think that what they are cloaking in legal form is rather 'common sense' or 'elementary principles of morality', rather than ideological premises (ibid, p. 73).[80]

Interpreting and implementing the law is interconnected and involves making decisions about the right way forward, with little actual room for neutrality in such judgments.[81] Even when judges choose to uphold legislation, statutes, and past cases - rendering decisions that oppose their personal opinions - they demonstrate personal values about their roles and responsibilities as persons within the legal system. Often, one's personal values may align this those of the State, which permits unreflexive illusions of neutrality. Where the interests of the judge, the public, and the State are in conflict is when

---

[76] The term "indexicals" refers to "a class of linguistic items identifiable by the particular way in which their meaning depends on an utterance event," as cited in Amy Rose Deal, *A Theory of Indexical Shift: Meaning, Grammar, and Crosslinguistic Variation* (Cambridge, MA: The MIT Press, 2020) at 1. For example, the word *tomorrow* means something different, depending on the current context in which the word is spoken.
[77] Philips, *supra* note 70 at 80.
[78] Bernstein, *supra* note 21 at 16.
[79] Ibid at 27.
[80] Mańko, *supra* note 25 at 183; Bosmajian, "Metaphor and Reason", *supra* note 1, defines hegemony as "the ability of some groups to subordinate others" at 8.
[81] Bernstein, *supra* note 21 at 27.

commitments to neutrality may be more obviously apparent and are more likely to be explicitly articulated.

Finally, it is important to acknowledge judges as persons who hold positions of power in society. *Power* is a concept that is "not a distant abstraction but rather an everyday reality."[82] To study power involves an interpretation of "why inequities exist and how [power] is maintained."[83] Although law is subject to public criticism about fairness and equitable access,[84] the public continues to have more confidence in the judicial system than other government institutions.[85] Public confidence translates to heightened legitimacy and influence. Conversely, a lack of public confidence erodes trust. This opinion was articulated by Justice Deschamps, who contextualized cannabis use as "socially neutral conduct" that causes no harm and is not immoral.[86] Thus, when cannabis use is defined as a crime, she argues, "Citizens become inclined not to take the criminal justice system seriously and lose confidence in the administration of justice" and "Judges become reluctant to impose the sanctions attached to such laws."[87]

As a result of their position of power, the decisions of judges are understood as "giving direction to society to some extent," through adopting "new rules or standards for the resolution not merely of the dispute before him [her/them], but also for future disputes of a similar kind."[88] Beyond this, judges enact power through their privileged role in shaping discourse about legal and social concepts. The dominance of both legal and medical discourses about drugs and addiction, described in more detail in section 1.3.3, are evidence of societal power structures.[89]

One way power becomes enacted discursively is in the selection of what content and whose perspectives to include or exclude. In Canada, the importance of involving people who identify as using drugs in the development of policy and legislation is increasingly

---

[82] Bosmajian, "Metaphor and Reason" *supra* note 1 at 2.
[83] Ibid at 8.
[84] Bosmajian, "Metaphor and Reason" *supra* note 1.
[85] Shetreet, *supra* note 24.
[86] *R v Malmo-Levine; R v Caine* 2003 3 SCR 571, 2003 SCC 74 [*Malmo-Levine*] at para 301.
[87] *Ibid,* at para 290.
[88] John Bell, *Policy Arguments in Judicial Decisions* (Oxford: Oxford University Press, 1983) at 7-8.
[89] Bosmajian, "Metaphor and Reason" *supra* note 1.

valued.[90] This represents a shift in power, where people directly impacted by laws and policies are systematically included in decision-making spaces from which they were previously excluded.

In law, other examples of discursive power, examined more in section 1.2.2, are the explicit and implicit inclusion and exclusion of various types of evidence and the legitimacy afforded to various types of knowledge sources. For instance, the introduction of legal theory and knowledge claims from past cases are generally not afforded the same degree of skepticism or scrutiny as information introduced through empirical research or expert testimony.

In these two sections, I introduced perspectives of the law and the role of judges as socially embedded, influenced by values and ideology. In the next section, I examine judicial decisions as a distinct discursive genre.

1.2.2 Judicial Decisions as a Distinct Discursive Genre

Judicial decisions constitute a distinct discursive genre. Durant & Leung explain:

> Each different genre consists of interlocking elements that together allow it to fulfil a particular purpose. While genres can be found across all domains of discourse, in law specific genres serve precisely defined roles: they may prohibit something; impose duties or obligations; make promises; impose an order; advocate a course of action; or report the reasoning or findings of a court.[91]

There are typically conventions, protocols, and traditions that govern how language is used and information is conveyed in legal genres, often with templates available to guide the style of writing, format, and type of content. Judicial decisions are a specific form of discourse where one or more judges communicate their decision and rationale for cases between two opposing parties. Decisions made by a panel of judges may be delivered by

[90] For example: Government of Canada, "How we Built a National Action Plan with Partners" (9 March 2023) online: <https://www.rcaanc-cirnac.gc.ca/eng/1590950479157/1590950564663>; Government of Canada, "Consulting Persons with Disabilities" (29 July 2022) online: <https://www.canada.ca/en/employment-social-development/programs/accessible-canada-regulations-guidance/consultation/section2.html>.
[91] Durant, *supra* note 6 at 11.

one person[92] following collective deliberation and a majority decision, with the other judges having the option to include concurring or dissenting opinions.

Many cases related to drugs involve individual sentencing for charges related to importation, production, possession, and/or trafficking. Because the majority of judicial decisions reviewed in this thesis are sentencing remarks, I focus the discussion about genre on sentencing. Judicial decisions for sentencing typically include: information about the case (court, parties, lawyers, judges, date), an overview, facts and other evidence (e.g., documents, reports), circumstances of the offence, positions of the parties, general sentencing principles, objectives of sentencing in the case, aggravating and mitigating factors for the case, joint recommendations, available dispositions, discussion on appropriate sentencing, ancillary orders, and a conclusion.[93] There is variability in the format and detailedness between judges and between Courts.

To inform this overview, I draw on information about the governance of drug offences as per the *Criminal Code* and the *Controlled Drugs and Substances Act* (*CDSA*). The *Criminal Code* is federal law enacted by the Parliament of Canada which defines a broad range of criminal offences. The *CDSA* is another criminal statute that defines and regulates the possession, production, distribution, and sale of controlled substances.

In Canada, the fundamental purpose of sentencing is defined in Section 718 of the *Criminal Code*[94] and Section 10 of the *CDSA.*[95] Ideally, sentencing is intended to contribute to "respect for the law and the maintenance of a just, peaceful and safe society."[96] In 1996, Bill C-41 introduced sentencing reform that was meant to codify the purpose and principles of sentencing and reduce variation between judges and jurisdictions.

1.2.2.1 Objectives of Sentencing

[92] Note that some judicial decisions are 'by the Court,' without a named judge.
[93] For instance, see Criminal Law Notebook, "Sentencing Brief (Generic)" (2023), online: http://criminalnotebook.ca/index.php/Sentencing_Brief_(Generic) [perma.cc/FC9M-SCF6].
[94] *Criminal Code,* RSC 1985 c C-46 s 718
[95] *Controlled Drugs and Substances Act,* SC 1996, c 19 [*CDSA*] s 10.
[96] *Criminal Code,* RSC 1985 c C-46 718.1.

The stated objectives of sentencing are:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.[97]

Notably, "harm done to victims or to the community" is mentioned in three of the six objectives.[98] Besides the conduct of interest being "unlawful" or defined as an "offence," no other indicators beyond harm are described. Thus, when articulating judicial reasoning that informs the determination of a just and appropriate sentence, it is reasonable that harm will be explicitly considered.

In this section, I provide some information about the variety of content discussed in the genre of sentencing remarks. In this thesis, I focus the introduction of sentencing principles on those of greatest pertinence to the analysis of the discursive construction of the harm of drugs. Specifically, I elaborate on general sentencing principles of denunciation, deterrence, rehabilitation, proportionality, parity, and restraint.[99] I briefly discuss select aggravating and mitigating factors including gravity, sophistication of the offence, responsibility and moral culpability of the offender, and addiction and mental health. With respect to appropriate sentencing, I discuss the circumstances of the offender. When a judge is deciding a sentence, it is not expected all objectives will hold equal weight, nor is it considered tolerable to consider only a single objective.

In *Lyons,* it was explained:

---

[97] RS, 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6
[98] In a 2015 amendment, the term "protection of society" was added to the opening sentence of s. 718 and the term "harm done to victims or community by unlawful conduct" as added to s. 718(a). Government of Canada, "A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code" (20 January 2023), online: < https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/p4.html>
[99] Note that objectives of separation, reparation, and offender-victim-community restoration were less pertinent in this research.

> The imposition of a sentence which 'is partly punitive but is mainly imposed for the protection of the public' seems to me to accord with the fundamental purpose of the criminal law generally, and of sentencing in particular, namely, the protection of society. In a national system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.[100]

The objectives are reviewed in relation to individual cases with respect to the protection of the community.[101] Judges have discretion to determine the most suitable sentence after careful consideration of all circumstance, as reflected in *R v M (CA)*:

> the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.[102]

1.2.2.3 General Sentencing Principles

Denunciation is meant to convey societal condemnation of specific conduct. The principle of denunciation was addressed in *Sargeant,* where Lord Justice Lawton asserted, "society, through the courts, must show its abhorrence of particular types of crime, and the only way in the courts can show this is by the sentences they pass."[103] The greater the perceived need for deterrence and denunciation, the more severe the sentence. For instance, in *Proulx*, it was decided, "There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct."[104]

---

[100] *R v Lyons*, 1987 2 SCR 309, 1987 2 RCS 309, 1987 SCJ No 62, 1987 ACS no 62 at para 26 [*Lyons*].
[101] *R v Nasogaluak,* 2010 1 SCR 206, 2010 SCC 6, 2010 1 RCS 206, 2010 SCJ No 6, 2010 ACS no 6 [*Nasogaluak*].
[102] *R v M (CA)*, 1996 1 SCR 500 at para 91 [*M (CA)*].
[103] *R v Sargeant*, 1974 60 Cr App R 74 at 77.
[104] *R v Proulx*, 1 SCR 6, 2000 SCC 5, 2000 1 RCS 61, 2000 SCJ No 6, 2000 ACS no 6 at para 106 [*Proulx*].

The expectation of *deterrence* is that sentences will influence behaviour.[105] Specific deterrence reflects the intent to deliver a sufficiently severe penalty that reduces the likelihood the convicted person will engage in the same or similar conduct in the future. General deterrence reflects the intent to dissuade other members of the public from engaging in the conduct to avoid the risk of facing a similarly severe penalty. However, empirical research conducted over the past half century has not supported claims that increasing severity of sentences prevents crime.[106] This lack of evidence is acknowledged in *Proulx,* where Chief Justice Lamer stated, "The empirical evidence suggests that the deterrent effect of incarceration is uncertain."[107]

In *Lacasse*, Wagner C. J. stated, "One of the main objectives of Canadian criminal law is the *rehabilitation* of offenders. Rehabilitation is one of the fundamental moral values that distinguished Canadian society from of many other nations in the world, and it allows judges to impose sentences that are just and appropriate."[108] In the legal context, rehabilitation[109] refers to the accused making changes toward becoming a law-abiding citizen.[110] At the time of sentencing, if a person convicted of a crime demonstrates having made progress in their rehabilitation, such as attending mental health or addiction counselling, becoming involved in work or education, increasing engagement in supportive relationships, volunteering in outreach programs, and refraining from

---

[105] Kent Roach, *Criminal Law. Essentials of Canadian Law,* 8th ed (Toronto: Irwin Law, 2022).
[106] Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Just 143; Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:4 Man LJ 149 at 150 [Hrymak]; Research about minimum mandatory sentences further demonstrates ineffectiveness to achieve outcomes of deterrence. Michael Tonry elaborated, "No matter which body of evidence is consulted - the general literature on the deterrent effects of criminal sanctions, work more narrowly focused on the marginal deterrence hypothesis, or the evaluation literature on mandatory penalties - the conclusion is the same. "There is little basis for believing that mandatory penalties have any significant effects on rates of serious crime" per Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38:1 Crime & Just 65, at 100.
[107] *Proulx, supra* note 104 at 107.
[108] *R v Lacasse*, 2015 2015 3 SCR 1089, 2015 SCC 64, 2015 3 RCS 1089, 2015 SCJ No 64, 2015 ACS no 64 [*Lacasse*] at para 4.
[109] The word rehabilitation has different meanings in different disciplines. In physical health settings it typically refers to approaches to optimize participation in daily activities in relation to barriers experienced in relation to individual physical, cognitive, social, and/or emotional factors. In addictions settings, rehabilitation typically refers to approaches designed to support people to reduce or abstain from the use of alcohol or drugs.
[110] Cole, *supra* note 68.

engaging in criminal conduct, the judge may issue a less severe sentence, such as a shorter carceral sentence, a conditional sentence, or a suspended sentence.[111]

The Standing Committee on Public Safety and National Security asserted that correctional institutions serve distinct purposes:

> people suffering from mental disorders and addictions should not end up in detention because of these problems or the lack of community ressources [sic]. Correctional institutions should not be serving as hospitals by default. In general, prison is not suited to caring for people affected by such problems.[112]

Therapeutic jurisprudence is an approach specifically designed and implemented within legal systems to "minimise the law's negative effects and maximise its positive effects on the well-being of, usually offenders, but sometimes also victims, including their psychological and emotional well-being."[113] In *Briscoe,* the Ontario Superior Court defined it as follows:

> Therapeutic jurisprudence is an analytical framework that seeks to assess the therapeutic and anti-therapeutic consequences of law and how it is applied. The objective is to "examine the law's therapeutic values and minimize the anti-therapeutic consequences without sacrificing due process or other judicial values." Therapeutic jurisprudence:
>
> > seeks to use the application of law to produce therapeutic outcomes of accused within the criminal justice system. It is a process based and multidisciplinary approach to law that focuses on the underlying contributors of crime, seeking to address them by implementing effective therapeutic initiatives. It aims to take advantage of the historical underappreciated therapeutic potential in law. The law is not neutral -- it can be applied in a manner that can benefit the accused [and hence society].[114]

---

[111] See e.g. *R v Shallow*, 2019 OJ No 131, 2019 ONSC 403 [*Shallow*] and *R v Johnson*, 2015 OJ No 2819, 2015 ONSC 80 [*Johnson*]; Canada Supreme Court Reports SCR | RCS [2000] vol 1; *R v Knott*, 2012 2 SCR 470, 2012 SCC 42, 2012 2 RCS 470, 2012 SCJ No 42, 2012 ACS no 42.

[112] Kevin Sorenson, "Mental Health and Drug and Alcohol Addiction in the Federal Correctional System: Report of the Standing Committee on Public Safety and National Security" (December 2010, 40th Parliament, 3rd Session) online: https://www.ourcommons.ca/Content/Committee/403/SECU/Reports/RP4864852/securp04/securp04-e.pdf [perma.cc/3KLQ-GN27].

[113] Rosemary Hunter, "Judicial Diversity and the 'New' Judge" in Sonia Harris-Short, Hilary Sommerlad, Steven Vaughan, & Richard Young, eds, *The Futures of the Legal Education and the Legal Profession* (Oxford: Hart Publishing, 2015) 79 at 87. Therapeutic jurisprudence approaches are designed to support offender rehabilitation.

[114] *R v Suter*, 2018 2 SCR 496, 2018 SCC 34, 2018 2 RCS 496, 2018 SCJ No 34, 2018 ACS no 34; *R v Briscoe*, 2019 OJ No 2031, 2019 ONSC 2471 at para 31, citing: D B Wexler & B D. Winick, eds, *Law in a Therapeutic Key* (Durham, NC: Carolina Academic Press, 1996) and R D Schneider, H Y Bloom & M Heerema, *Mental Health Courts -- Decriminalizing the Mentally Ill* (Toronto: Irwin Law, 2007) at 65.

More recently, in *R v Hills*, the Supreme Court reinforced the importance of rehabilitation as a section 12 *Charter* right:

> Given the purpose of s. 12, the role given to rehabilitation when considering a mandatory minimum will help determine if the provision amounts to cruel and unusual punishment. While rehabilitation has no standalone constitutional status, there is a strong connection between the objective of rehabilitation and human dignity. A punishment that completely disregards rehabilitation would disrespect and be incompatible with human dignity and would therefore constitute cruel and unusual punishment under s. 12. In order to respect s. 12, punishment or sentencing must take rehabilitation into account.[115]

Part I.1 10.1 of the *CDSA* includes a section on evidence-based diversion,[116] in acknowledgement of the importance of responding to "problematic substance use" as a "health and social issue."[117] Criminal sanctions "are not well established with public health evidence" and can create negative repercussions related to social stigma and barriers associated with having a criminal record. Evidence-based diversion is aimed at providing opportunities for interventions that "protect health, dignity and human rights," reducing harm to individuals, families, and communities.[118]

By adopting diverse approaches such as education, treatment, aftercare, rehabilitation, and social reintegration, "judicial resources are more appropriately used in relation to offences that pose a risk to public safety."[119]

The principle of *proportionality* indicates, "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[120] *In M (CA)*, Chief Justice Lamer declared,

> Within broader parameters, the principle of proportionality expresses itself as a constitutional obligation. A legislative or judicial sentence that is grossly disproportionate, in the sense that it is so excessive as to outrage standards of decency, will violate the constitutional prohibition against cruel and unusual punishment under s. 12 of the Canadian Charter of Rights and Freedoms.[121]

---

[115] *R v Hills* 2023 SCC 2 [Hills] at 13.
[116] *CDSA* I.1 (b)*, supra* note 95 at 13. The *CDSA* received royal assent on November 17, 2022.
[117] *Ibid*.
[118] *Ibid*.
[119] *CDSA, supra* note 95 at 13; For critical perspectives on court diversion programs, see Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, Taylor & Francis Group, 2020).
[120] *R.S.*, 1985, c 27 (1st Supp), s 156; 1995, c 22, s 6.
[121] *M (CA), supra* note 102 at 530.

In *Ipeelee*, proportionality was described as contributing to a just, peaceful and safe society through "the imposition of just sanctions."[122] The principle of proportionality guides judges to ensure that the sentence is suitable for the gravity of the offence. The judge explained:

> [The principle of proportionality] promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 533:
>
> > It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender..[123]

Kent Roach defines proportionality as a retributive concept that attends predominantly to moral blameworthiness and seriousness of the crime, rather than a utilitarian approach to future impact which is considered through principles of rehabilitation and deterrence.[124] *Parity* is the principle that a person convicted of a crime shall receive a sentence that is similar to previous sentences imposed on others for similar offences that were conducted under similar circumstances.[125] Parity is described as involving consideration of "equality," where people involved in the same offence are treated similarly, and "consistency," which involves comparison to previous sentences.[126] When considering sentencing remarks as a distinct discursive genre, this principle increases the likelihood that judicial decisions will include citations of previous cases that are similar in some way to the case at hand. Judges will likely consider a range of sentences delivered for

---

[122] *R v Ipeelee,* 2012 SCC 13 at para 37 [*Ipeelee*].
[123] *Ibid* at para 37.
[124] Roach*, supra* note 105.
[125] *R v Parranto*, 2021 SCJ No 46, 2021 SCC 46, 2021 ACS no 46, 75 CR (7th) 217, EYB 2021-418889, 2021EXP-2759, 2021 CarswellAlta 2846, 2022 1 WWR 1, 31 Alta LR (7th) 213, 411 CCC (3d) 1, 463 DLR (4th) 389 [*Parranto*].
[126] Bruce MacFarlane et al, *Drug Offences in Canada*, 4th ed (Toronto: Carswell, 2015) at 33-46.8 [MacFarlane].

similar offences and provide a comparative rationale.[127] It has been argued that proportionality should hold more weight than parity, considering factors like gravity of the offence and moral culpability of the offender.[128] In *Parranto*, the Supreme Court of Canada (SCC) clarified their perspective:

> A sentence is not demonstrably unfit simply because it falls outside of a particular sentencing range. A proportionate sentence must reconcile the principles of individualization and parity: the trial judge must calibrate a sentence that is proportionate for *this* offence by *this* offender, while also being consistent with sentences for similar offences in similar circumstances: Lacasse, at para. 53. However, parity is a secondary sentencing principle, subordinate to proportionality (*Lacasse*, at para. 54), and cannot "be given priority over the principle of deference to the trial judge's exercise of discretion": *R. v. L.M.,* 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 35. As LeBel J. explained in L.M., "[t]he principle of parity does not preclude disparity *where warranted by the circumstances*: para. 36 (emphasis in original), citing F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 18.[129]

The importance of a fit sentence was articulated in *Lacasse*, where "A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives."[130]

The principle of *restraint* informs principles that:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.[131]

Despite beliefs held by many that severity of punishment can act as a deterrence, in *Nur,* the SCC cautioned that "a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending."[132]

---

[127] In *R v Shropshire* 1995 4 SCR 227, 1995 4 RCS 227, 1995 SCJ No 52, 1995 ACS no 52, it was explained that identifying sentencing ranges provides the judge with discretion to consider the varying degrees of the seriousness of the crime and moral culpability.
[128] *Lacasse, supra* note 108 at para 92.
[129] *Parranto, supra* note 125 at 234.
[130] *Lacasse, supra* note 108 at 3.
[131] *Criminal Code*, RSC 1985, c C-46*,* s.718.2 (d) and (e); 1995, c. 22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95; 2001, c. 32, s. 44(F), c. 41, s. 20; 2005, c. 32, s. 25; 2012, c. 29, s. 2; 2015, c. 13, s. 24, c. 23, s. 16.
[132] *R v Nur*, 2015 SCC 15 at para 45.

1.2.2.2 Sentencing Considerations

Gravity, as pertains to s. 718 speaks to the seriousness of the conduct as determined by Parliament and as perceived in relation to the particular case. *Ellis* defined gravity citing *Hamilton*:[133]

> the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and any specific features of the commission of the crime which may tend to increase or decrease the harm or risk of harm to the community occasioned by the offence.[134]

Seriousness of drug related crimes relates to factors such as how long the person was engaged in the conduct, the quantity of drugs, the type of drug(s), sophistication of operations, potential for profit, and the role of the person (particularly within a hierarchy of a criminal organization.[135] Determination of gravity may include an evaluation of the dangerousness of the drug[136] and assessments of dangerousness may shift over time. Currently, in Canada, fentanyl is viewed as posing particularly high risks, as noted in *Smith*:

> In sum, the continuing escalation in the number of fentanyl-detected deaths, the enormity of the total numbers of accidental overdosing, the increasing percentage of fentanyl detected deaths as a proportion of the total, and the currently ubiquitous awareness of the risks posed by illicit fentanyl, in combination, justify a recognition of a very substantial increase in the sentencing range applicable to street-level dealing in fentanyl.[137]

With respect to drug related crimes, the *sophistication of the offence* pertains to the production, distribution, and/or importation of drugs. Commercial level distribution is typically associated with longer carceral sentences.[138] Within the discursive genre of sentencing remarks, judges may evaluate the harmfulness of drugs to support the rationale for their decisions around the gravity of the offence, as will be demonstrated in the findings.

---

[133] *R v Hamilton,* 2004 OJ No 3252, 186 CCC (3d) 129, at 90.
[134] *Ellis 2022, supra* note 44 at 84.
[135] *R v Oates,* 1992 NJ No 165 [*Oates* 1992a]
[136] MacFarlane, *supra* note 126 at 33-14.
[137] *R v Smith*, 2017 BCJ No 471, 2017 BCCA 112 [*Smith*] at 65.
[138] See e.g. *R v Oates*, 1992, 74 CCC (3d) 360 [*Oates* 1992b]; *R v Debrowney*, 1992 SJ No 89, 97 SaskR 262, 15 WCB (2d) 403; *R v Lepine*, 1994 88 CCC (3d) 1 SCC; *R v White,* 2020 NSJ No 131, 2020 NSCA 33, 387 CCC (3d) 106 [*White*].

The *responsibility* and *moral culpability of the offender* reflects the extent to which a person is viewed as personally accountable for their actions and harms (actual or potential). Moral culpability assumes the person has "the rational capacity to appreciate the difference between a right choice and a wrong one, and who was in circumstances that provided for a meaningful exercise of that choice."[139] *Lacasse* defined:

> The "degree of responsibility of the offender" as used in s. 718.1 certainly includes the mens rea level of intent, recklessness or wilful blindness associated with the actus reus of the crime committed. For this assessment, courts are able to draw extensively on criminal justice principles. The greater the harm intended or the greater the degree of recklessness or wilful blindness, the greater the moral culpability. However, the reference in s. 718.1 is not simply to the "mens rea degree of responsibility of the offender" at the time of commission of the crime. Parliament evidently intended "degree of responsibility of the offender" to include other factors affecting culpability. These might relate, for example, to the offender's personal circumstances, mental capacity or motive for committing the crime.[140]

The term *moral blameworthiness* appears to be used when conveying a similar perspective of accountability. For instance, in *Morris*, Justice Nakatsuru concluded,

> It [the flight from police] was not a coldly calculated act to escape but one based upon emotion and a state of mind that has been shaped both generally and specifically by the historical racism suffered by Blacks and by you [the accused]... Given that the choice you made to do so was affected by these factors, the moral blameworthiness of your actions is also lessened.[141]

In *M (CA)*, Justice Lamer discussed considerations of moral blameworthiness and its perceived connection to retribution:

> it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions. With regard to the attribution of criminal liability, I have repeatedly held that it is a principle of "fundamental justice" under s. 7 of the *Charter* that criminal liability may only be imposed if an accused possesses a minimum "culpable mental state" in respect of the ingredients of the alleged offence. See *Martineau*, *supra*, at p. 645. See, similarly, *Re B.C. Motor Vehicle Act*, *supra*; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. It is this mental state which gives rise to the "moral blameworthiness" which

[139] Sujung Lee, Re-Evaluating Moral Culpability in the Wake of Gladue" (2020) 78:2 U Toronto Fac L Rev 109 at 114.
[140] *Lacasse, supra* note 108 at para 130, citing: *R v JLMA*, 2010 ABCA 363, 499 AR 1, at paras 58-59; see also *Nasogaluak*, *supra* note 101 at para 42; *M (CA)*, *supra* note 102 at para 40.
[141] *R v Morris*, 2018 ONSC 5186 at para 66.

> justifies the state in imposing the stigma and punishment associated with a criminal sentence.[142]

Mental health and addiction are complexly considered as potential mitigating factors. In general, when a person with a history of substance-related addiction demonstrates evidence of "good prospects for rehabilitation," this is considered a mitigating factor.[143] It has been found inappropriate to consider prior drug use as an aggravating factor for charges related to trafficking.[144] Mental health factors, in general, have a mitigating value in sentencing.

Individual *circumstances of the offender* are considered. Pre-sentence reports provide background information on the person convicted of a crime, summarizing individual risks and needs for support. The quality of these reports is essential, as research indicates 80 percent concordance between recommendations made on the pre-sentence reports and dispositions.[145]

Palys observed that various principles and objectives may be in conflict with one other with regard to the impact on sentencing. It is the judge's role to weigh the degree of influence of competing principles. Palys describes:

> Rehabilitative goals are typically associated with non-incarcerative or relatively short incarcerative sentences, for example, while general deterrence and protection of the public argue for longer, more severe sentences. Given that differential subscription to particular legal objectives 'explains' sentence disparity in a particular case, then it follows that the relative amount of disparity which emerges in any case will be influenced by the homo- or heterogeneity of legal objectives which vie for attention on a case-by-case basis.[146]

In the remainder of this section, I briefly introduce other factors that influence sentencing decisions in Canada. They predominantly influence judicial reasoning around sentencing decisions, but may influence the discursive construction of harm. While it is possible that

---

[142] *M (CA), supra* note 102 at 79, emphasis in original.
[143] *R v Hendy*, 2014 BCJ No 3068 (CA), 2014 BCCA 485, 364 BCAC 183; *R v Do*, 2019 BCCA 191 [*Do*]; MacFarlane, *supra* note 126 at 33-37.
[144] *R v Valentini*, 1999, 132 CCC (3d) 262 (Ont CA).
[145] Hannah-Moffat, Kelly & Paula Maurutto, "Re-contextualizing Pre-sentence Reports: Risk and Race" (2010) 12:3 Punishment & Soc 262; Public Safety Canada, "Presentence Reports – Research Summary Vol 10 No 5" (September 2005) online: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/prsntc-rprt/index-en.aspx [perma.cc/VSR5-XEXA].
[146] Palys, *supra* note 61 at 359.

considerations of systemic factors may affect how drug-related harm is discursively constructed, this was not a focus of data collection or analysis. Similarly, conditional sentence orders (CSOs) and MMPs are not the object of analysis in this thesis, but serve as important context when interpreting the data. These factors include the importance of taking judicial notice of systemic factors that disproportionately criminalize racialized populations, CSOs, Mandatory Minimum Penalties (MMPs), and the inclusion of expert testimony.

Firstly, in recognition of and response to the over-representation of Indigenous people in Canadian prisons, the SCC in *Gladue* established factors that must be considered in sentencing remarks:

> (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender.[147]

Courts are expected to consider alternatives to incarceration, including the availability of restorative justice.[148]

The importance of taking judicial notice of systemic factors and individual experiences of Indigenous people[149] was reaffirmed in *Ipeelee*:

> The Court held, therefore, that s. 718.2(e) of the Code is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (Gladue, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (Gladue, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which

[147] *R v Gladue*, 1999 1 SCR 688, 1999 1 RCS 688, 1999 SCJ No 19, 1999 ACS no 19, 23 CR(5th) 197, 133 CCC (3d) 385 at paras 37, 47, 93.
[148] Roach*, supra* note 105.
[149] Note that in *R v Anderson,* 2014 SCC 41, it was decide that Crown prosecutors are not obligated to take into account a person's Indigenous status, as this "conflates the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that applies only to judges" at para 20.

> may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (Gladue, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the presentence report (Gladue, at paras. 83-84).[150]

In 2014, Impact of Race and Culture Assessments (IRCAs) were used to redress systemic discrimination demonstrated though disproportionate over-representation based on factors of race and culture. Information provided in IRCAs inform judicial decisions that balance legal principles requiring sentence to be individualized and rehabilitative as well as reflective of personal blameworthiness and goals towards deterrence.[151] IRCAs are more commonly used in Ontario and Nova Scotia than other provinces.[152]

Section 742.1 of the *Criminal Code* states that when a person is convicted of an offence and sentenced to less than two years' imprisonment, the court may consider a CSO.[153] Until *Chen*, this was interpreted to mean that anyone convicted of trafficking or possession for the purposes of trafficking would receive a sentence of imprisonment in a correctional facility, unless exceptional circumstances were established. In the decision for *Chen*, Justice Schultes argued overreach about what constituted a serious crime, stating:

> At the end of the day, I think that the potential overbreadth of these specific provisions rests not on which of these particular values that have been identified were intended to be advanced by the legislation, but whether there was an overreach from what was intended by the expression "serious offences" in relation to them.[154]

---

[150] *Ipeelee, supra* note 122 at para 59.
[151] Harman Mann, "Implementing 'Impact of Race and Culture Assessments' in the Sentencing of Black Nova Scotian Offenders: *R v Anderson*" (22 March 2022) *thecourt.ca*, online <https://www.thecourt.ca/implementing-impact-of-race-and-culture-assessments-in-the-sentencing-of-black-nova-scotian-offenders-r-v-anderson/>. In *R v Anderson*, 2021 NSJ No 334, 2021 NSCA 62, 405 CCC (3d) 1, 74 CR (7th) 333, 2021 CarswellNS 570, 174 WCB (2d) 577, it was decided that systemic factors such as residential instability in impoverished neighbourhoods, lack of education and educational opportunities, cultural norms of violence, racial profiling practices by local police, and experiences of trauma and loss may inform judicial decisions that blend sentencing principles.
[152] Bystrzycki, *Alexia R, Measuring and Assessing the Impact of Race and Culture Assessments in Sentencing* (Master of Laws, Dalhousie University, 2022) [unpublished].
[153] *Criminal Code*, RSC 1985, c C-46, s 718.1; See Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022, c 15 (assented to 17 November 2022).
[154] *R v Chen,* 2021 BCJ No 787, 2021 BCSC 697 at section 203 [*Chen*].

Justice Schultes noted "the very strong weight that rehabilitation must be given in the analysis, given Mr. Chen's many attributes that support that likelihood."[155] This decision has been considered in several subsequent cases to support arguments for CSOs and suspended sentences in cased where sentences are two years and longer. The decision in *Chen* and the integration of diversion in to the *CDSA*[156] have important implications for sentencing and have been considered in a number of subsequent drug-related cases, which will be discussed more in the analysis.[157]

Many MMPs[158] were added to the *CDSA* in 2006, under the Conservative government when Stephen Harper was Prime Minister.[159] MMPs impose a minimum penalty (i.e., length, extent, or severity of sentence; fines; prohibition of certain conduct) for specific criminal offences, which may or may not include incarceration. Under Justin Trudeau's Liberal government, reforms to MMPs were introduced in Bill C-5.[160] The intent was to "restore judicial discretion at sentencing and provide more opportunities for pre-charge diversion for minor drug offences."[161] One related reform is to require police and prosecutors to consider alternatives to charges for simple possession of drugs and, instead, to offer opportunities for diversion to an addiction treatment program, issue a warn, or take no action at all.[162] The *CDSA* was amended to reflect this on November 17, 2022.

1.2.2.4 Expert Testimony

---

[155] *Ibid* at section 64.
[156] As discussed previously with respect to change to Part I.1 10.1 of the *CDSA* introduced in Bill C-5 in 2022.
[157] See e.g. *R v Aeichele*, 2022 BCJ No 233, 2022 BCSC 195 [*Aeichele*]; *R v Howard*, 2021 BCJ No 1478, 2021 BCPC 167 [*Howard*]; *R v Milne*, 2021 BCSC 1859 [*Milne*]; *R v Mitchell*, 2022 BCJ No 2560, 2022 BCSC 2321 [*Mitchell*]; *R v Webber,* 2021 BCJ No 2692, 2021 BCPC 296.
[158] Also called Mandatory Minimum Sentences (MMS)
[159] Government of Canada, "Bill C-22: Mandatory Minimum Penalties to Be Repealed" (7 December 2021), online: *Department of Justice Canada* <https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-to-be-repealed.html>
[160] Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022, c 15 (assented to 17 November 2022)
[161] Government of Canada, "Policy Qs and As: Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act" (2023), online: https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/c5/qa-qr.html#s5 [perma.cc/AN65-4AZD].
[162] *Ibid.*

A final topic for consideration in this section is the use of *expert testimony*. While this is not a sentencing principle, it is a significant instrument which informs legal reasoning and impacts sentencing decisions. Qualified experts may be invited to convey reasoned opinions about matters related to a case. They are expected to be independent and objective are not permitted to be an advocate for any of the parties.[163] *Mohan* is the leading case about the appropriate use of expert testimony. Justice Sopinka outlined "dangers" associated with the use of expert testimony in cases that involve a jury, including:

- misuse and distortion of the fact-finding process
- inclusion of scientific language the jury does not easily understand
- the type of evidence "apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves"[164]
- a potential to mislead or divert the jury
- a potential to confuse the jury
- a potential to represent a personal opinion as opposed to an opinion within the field of expertise
- overwhelming the jury through an image of "mystic infallibility" of the evidence[165]
- constructing case "dressed up scientific jargon"[166]
- involving "an inordinate amount of time which is not commensurate with its value"[167]
- "is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability"[168]

[163] *Federal Courts Rules,* SOR/98-106, Rule 52.2. Note: Implications around apprehension of bias are considered in Section 3.2.3.
[164] *R v Mohan,* 1994 2 SCR 9, 1994 2 RCS 9, 1994 SCJ No 36, 1994 ACS no 36, 1994 CanLII 80 at para 21 [*Mohan*].
[165] *Ibid* at para 22.
[166] *Ibid* at para 24.
[167] *Ibid* at para 21.
[168] *Ibid*.

The concerns raised here pertain to information[169] and research literacy[170] skills. Without adequate education and/or experience, judges may also face these types of challenges when relying on expert testimony, as well as empirical research.

To mitigate the inclusion of 'dangerous' or inappropriate expert testimony, Justice Sopinka, in *Mohan*, proposed specific criteria which continue to be widely accepted. These include: i) relevance, ii) necessity in assisting the trier of fact, iii) absence of any exclusionary rule; iv) a properly qualified expert. Relevance is considered "a threshold requirement to be decided by the judge as a question of law."[171] With respect to necessity, Justice Sopinka clarified:

> The word 'helpful' is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information 'which is likely to be outside the experience and knowledge of a judge or jury.[172]

Determination of a properly qualified expert requires a person prove "special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."[173]

This brief overview of sentencing principles and related topics that influence sentencing decisions serves to provide an understanding of sentencing as a unique genre, shaped by particular rules and principles. In the next sections, I present judicial decisions as performative and constructive discursive practices.

---

[169] As stated in Annemaree Lloyd, *The Qualitative Landscape of Information Literacy Research Perspectives, Methods and Techniques* (London: Facet Publishing 2021), information literacy:

> enables a person to understand the sources and sites of knowledge and ways of knowing that contribute to becoming situated and emplaced. This knowledge, in turn, affords a person the opportunity and capacity to think critically about the way information is operationalised materially, i.e. through tools, mechanisms and source-related practices through which information is produced, reproduced, circulated, disseminated and archived.

[170] Research literacy involves developing an understanding about approaches to research and scientific concepts, understanding the impact of research within society, learning to effectively seek out and evaluate research, and knowing when and how to use research, as described by Andreas Eriksen, "The Research Literacy of Professionals: Reconciling Evidence-Based Practice and Practical Wisdom" (2022) 12:3 Professionals & Professionalism e4852.

[171] *Mohan, supra* note 164 at 10.

[172] *Ibid* at 23, citing *R v Abbey,* 1982 CanLII 25 (SCC).

[173] *Ibid* at 25.

1.2.3 Judicial Decisions as Performative

As a discursive practice, judicial decisions are at once performative and constructive. In this section I explain the performative nature of judicial decisions and in the following section I focus on judicial decisions as discursively constructive.

The performative nature of judicial decisions is not the focus of this thesis; however, it is an important discursive feature of legal discourse. In this context, the term *performance* is a linguistic term that relates specifically to the resultant outcomes of a speech act.[174] For instance, saying "excuse me" in a crowded space has *performative force*, resulting in other people (likely) changing their position in relation to the speaker. In a court of law, if a judge issues a sentence of incarceration to someone accused of a crime, there is a direct effect where the person will be incarcerated (barring unforeseen circumstances). Judicial pronouncements "induce and empower actions by other institutional bodies,"[175] as described here:

> The context of a judicial utterance is institutional behavior in which others, occupying preexisting roles, can be expected to act, to implement, or otherwise to respond in a specified way to the judge's interpretation. Thus, the institutional context ties the language act of practical understanding to the physical acts of others in a predictable, though not logically necessary, way. These interpretations, then, are not only "practical," they are, themselves, practices.[176]

The performative potential of an utterance is dependent on specific contextual factors. If the same words spoken in court were expressed in a criminal law moot, the language would not have the same declarative implications. Instead, what would be conveyed are the strengths of the two sides as part of a competitive learning experience. It is understood that "Secondary rules and principles provide the template for transforming language into action, word into deed."[177]

---

[174] Rebecca Kukla, "Performative Force, Convention, and Discursive Injustice" (2014) 29: 2 Hypatia 440.
[175] Elspeth Kaiser-Derrick, I*mplicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 36.
[176] Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601at 1611 [Cover 1986].
[177] *Ibid* at 1612.

It has been noted that certain discourses (such as legal discourses) have greater impact on social life than others, where "Power in social life and power in language are significantly connected."[178] One of the reasons that legal discourse is viewed as an aspect of power is that it can have direct and sometimes irreversible impact on people's lives. Statutes, such as the *Criminal Code*, the *CDSA*, the *Canadian Constitution*, and the *Indian Act,* permit and prohibit individual conduct in a multitude of ways with impacts that hold the potential to promote social order *and* to discriminate, to promote equity *and* to oppress.

Not all aspects of judicial decisions are performative. For instance, legal interpretations may serve to construct the legitimacy of a decision, but it is only the articulated decision that serves a performative function. In law, this performative function has been conceptualized as a form of violence.[179] Robert M. Cover is known for his theoretical work in this area, noting: "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[180] Cover elaborates:

> The violence of the act of sentencing is most obvious when observed from the defendant's perspective. Therefore, any account which seeks to downplay the violence or elevate the interpretive character or meaning of the event within a community of shared values will tend to ignore the prisoner or defendant and focus upon the judge and the judicial interpretive act. Beginning with broad interpretive categories such as "blame" or "punishment," meaning is created for the event which justifies the judge to herself [/himself/themselves] and to others with respect to her [his/their] role in the acts of violence.[181]

Beyond the performative potential of judicial decisions, they have a role in shaping social understandings of the law, human conduct, and people who engage in particular conduct

---

[178] M J Coyle, *Talking Criminal Justice: Language and the Just Society* (Abingdon: Routledge, 2013) at 39 [Coyle].
[179] Cover observed "the system guarantees the judge massive amounts of force – the conditions of effective domination – if necessary. It guarantees – or is supposed to – a relatively faithful adherence to the word of the judge in the deeds carried out against the prisoner" in Robert Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover* edited by Martha Minow, Michael Ryan & Austin Sarat (Ann Arbor: University of Michigan Press, 1992) at 224.
[180] Cover 1986, *supra* note 179 at 1601. Under certain circumstances, a judge may have the authority to order the incarceration of another human or to issue a sentence that condemns a person to death.
[181] Cover 1986, *supra* note 179 at 1608.

in particular ways. As noted above, judicial decisions convey certain values, morals, and theoretical perspectives.

1.2.4 Discursive Constructions of Crime and Criminality

Discursive constructionism is a perspective that discourse is both construct*ed* and construct*ive*.[182] Discourse is constructed through use of words and grammar, as well as metaphors, idioms, rhetoric, and interpretative repertoires.[183] It is constructive, in that "these assemblages of words, repertoires, and so on put together and stabilize versions of the world, of actions and events, of mental life."[184]

The idea that sentencing is an embedded aspect of the social construction of crime and criminality arises from both legal systems and the nature of discourse. From a legal systems perspective, it is observed that "historically sanctioned criminal procedures that select who to criminalize do more than usher people in or out of criminal justice institutions: they help to define, police, and exhaustively regulate the borders of normal social orders."[185] Drawing on legal theories[186] that acknowledge the sociopolitical context in which law is embedded, the "assumption about crime as an absolute phenomenon and as necessarily requiring punitive responses" can be contested.[187] Criminality, criminalization, crime, and "the identities of subjects (the accused, accusers, authorities)" become understood as "negotiated"[188] and ideology as embedded in law.

Researchers of law and the social sciences have explored how crime, criminality, and criminals become discursively constructed in law and legal settings. For instance, in a study undertaken by Danielle M. Romain Dagenhardt that involved observing probation

---

[182] Jonathan Potter & Alexa Hepburn, "Discursive Constructionism" in James A Holstein & Jaber F Gubrium, eds, Handbook of Constructionist Research (New York: The Guilford Press, 2008) 275.
[183] *Ibid.*
[184] *Ibid* at 277.
[185] George Pavlich & Matthew P Unger, "Introduction" in George Pavlich & Matthew P Unger, eds, *Entryways to Criminal Justice: Accusation and Criminalization in Canada* (Edmonton: University of Alberta Press, 2019) ix at xi [Pavlich].
[186] To the best of my knowledge, the discursive construction of crime and criminality has not yet been discussed by judges in case law.
[187] Pavlich, *supra* note 185 at xv.
[188] *Ibid* at xii.

review hearings in 347 cases involving family violence and non-compliance with conditions of probation, the researcher uncovered racial difference in how the men were constructed, as well as differences in legal decisions.[189] It was reported that judges were more likely to frame drug use by Black and Hispanic men "under personal choice and responsibility discourses, which often translated into short jail sanctions"; in contrast, use of drugs by White men was more likely to by framed "under addiction and mental health discourses, … which translated into verbal warnings and urging to get treatment."[190] Whether drug use was framed as an addiction or a personal choice was noted to vary depending on the type of drug:

> Which discourse emerged as dominant depended largely on drug type, frequency or consistency of use, and racialized assumptions of responsibility or mental health. Marijuana and cocaine were commonly framed under responsibility discourses, particularly for probationers of color, thus rendering probationers who used these drugs as irresponsible, making bad choices, and having personal weaknesses …. Alcohol and opioids, however, were mainly framed under addiction discourses, particularly for White probationers, with continued positive drug tests as indicative of relapse or substance dependence.[191]

Bernstein observed, "it is easier to notice language in its identifying and describing mode than in its constituting and revealing mode."[192] This might be even more challenging when attending to the spoken or written discourses of judges, to whom the public may defer authority. From a discursive perspective, particular meanings get attached to particular words. In legal jargon, for example, words and phrases come to have "specialized legal meanings."[193] One impact of this is to transform stories "in regular and predictable ways" in terms of structure and logic.[194] Revisiting sentencing remarks as a distinct genre, one can see how individual life stories and trajectories of conduct can become eclipsed through the highly structured reframing that follows strict discursive rules about what is and is not acceptable or pertinent to include.

Dagenhardt's research, described above, is an example of how:

---

[189] Danielle M Romain Dagenhardt, "'You Know Baseball? 3 Strikes': Understanding Racial Disparity with Mixed Methods for Probation Review Hearings" (2021) 10:6 Social Sciences 235.
[190] *Ibid* at 16.
[191] *Ibid* at 15.
[192] Bernstein, *supra* note 21 at 21.
[193] Bosmajian, "Metaphor and Reason", *supra* note 1 at 194.
[194] Bosmajian, "Metaphor and Reason", *supra* note 1 at 194.

> Language ideologies tie notions about communication to notions about social ordering in ways that allow participants [in this case, judges] to present normatively inflected images of society as though they were natural and unavoidable.[195]

She provides another racialized example where purported legal interpretations of the principle of responsibility function to represent some members of society in ways that are stigmatizing, discriminatory, and oppressive, observing:

> discourses on probationer progress often centered on responsibility—whether one was acting as a responsible adult balancing multiple priorities, or if one was "doing nothing" all day. Probationers who gave answers of being vaguely "busy" but did not offer excuses linked to employment or childcare responsibilities were often framed as not taking probation seriously and were often sanctioned to jail. Twenty-two probationers of color were framed as lazy, irresponsible, or doing nothing, compared to one White probationer.[196]

In sentencing remarks, discursive constructions such as these have the potential to be precedent setting when cited favourably or neutrally in future cases. This can create sentencing disparities and contribute to disproportionate penalization of racialized individuals. This relates to the claim made by Fowler, et al., who explain, "Language not only encodes power differences but it is also instrumental in enforcing them."[197] The discursive analysis of texts offers opportunities of "making explicit what power and habit have made implicit: the social inequality hidden in everyday language."[198]

Coyle expounds on the vital importance of attending to legal discourse, stating:

> In our social and 'criminal' justice discourse, language choices have considerable ramification. For example, when we define others as 'evil,' as 'innocent victims' or as 'criminals,' we justify the liberal application of social control upon selected others in our community.[199]

Engaging in a deeper analysis of *what* is said by judges and *how* it is said reveals explicit and implicit values and ideologies and undercovers various ways in which power is enacted. Michael J. Coyle cautions, "when we do not pay attention to how we talk about justice we often surrender ourselves to a justice system already determined by the rhetoric of moral entrepreneurs (public discourse leaders), whose language can conceal

---

[195] Bernstein, *supra* note 21 at 22.
[196] Dagenhardt, *supra* note 189 at 17.
[197] Fowler, et al, 1979, as cited by Coyle, *supra* note 178 at 39.
[198] Coyle, *supra* note 178 at 40.
[199] *Ibid* at 54.

justice agendas"[200] Legal theorists have put forward recommendations to promote "emancipatory inquiry" through an analysis of legal texts, including judicial decisions.[201] These include:

1. Analyzing the case before the court "in the entirety of its social, political, economic and ideological context."[202]
2. Ascertaining "what *legal materials* a court could find appropriate to decide the case."[203]
3. Evaluating the possible interpretations of the legal materials considered.
4. Determining which interpretative option was adopted by the court, considered in relation to the interests of the two parties.
5. Analyzing the ideologies that underlie judgment.
6. Ensuring "the judicial decision is analysed above all as a political decision on the contested interests of subjectivities which are in conflict."[204]

To progress the emancipatory analysis further, I propose it would be equally important to examine what materials, theories, and interpretations were *not* considered. This is not intended to be a limitless task, but judges and scholars may intentionally reflect on the extent to which subjugated perspectives are included or excluded.[205] This can be even more informative than acknowledging what *is* considered, as certain perspectives might be silenced or rendered invisible through their exclusion.

---

[200] *Ibid* at xiii.
[201] Mańko, *supra* note 25 at 187.
[202] *Ibid*.
[203] *Ibid* at 188.
[204] *Ibid*.
[205] It is increasingly recognized that court processes and decisions have disproportionately negative impacts on marginalized population and efforts are being made to prevent this from being perpetuated. An example of court process reform is evident in *R v Chouhan,* 2020 SCJ No 101, 2021 SCC 26, 2020 ACS no 101, 459 DLR (4th) 193, 2021EXP-1699, EYB 2021-392503, 2021 CarswellOnt 9154, 401 CCC (3d) 1, 72 CR (7th) 1, 163 OR (3d) 399, where it was asserted that "Instructions [to jurors] on specific biases and stereotypes that arise on the facts of the case should consider context and the harmful nature of stereotypical assumptions or myths, for example, the effects of colonization and systemic racism on Indigenous peoples or myth-based reasoning in sexual assault prosecutions" at 5. With respect to sexual assault specifically, Elaine Craig discusses ways in which myths about women and sex influenced sexual assault trials in Canada in Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018). An absence of the perspectives and voices of women, particularly those who experienced sexual assault, and feminist worldviews was an obvious oversight and a likely a remnant of an historically gendered judiciary and society.

To end this section, I share a final example of how "language use can help create social categories, groups, or objects of attention through socially constructed inclusion and exclusion."[206] Sarah Ferencz presents a comprehensive overview of the concept of social supply of drugs. The term social supply refers to the act of individuals "buying drugs together, buying drugs for another person, and pooling money to purchase a larger quantity of drugs to be shared with a social group."[207] Ferencz notes that the *Cannabis Act* does include a limited exception for social supply. However, in Canada, this type of conduct is generally treated as a trafficking offence. Haley Hrymak argues:

> Canada is currently[208] taking a very punitive approach to drug crimes and the sentences are influenced in part by the stigmas associated with people who use drugs, and the courts' reluctance to accept the inefficacy of deterrence. A significant impact of the courts' actions for fentanyl traffickers will be an increase in the number of individuals incarcerated in Canada, and this will have a particularly harsh impact on people with addictions and Indigenous people.[209]
>
> The severe punishment that drug offenders receive is tied to the stigma of drug offenders and people who use drugs as 'deviant others.' The stigma is dependent on the drug type, with low levels of stigma for marihuana, and higher levels for methamphetamine and heroin use. There is a propensity towards the punishment of people who use drugs because of the perception of the moral wrongfulness of drug use, and the perception of harm to both the individual and to others in society as a whole. Further, addiction is often stigmatized by society as a problem related to self control or a 'moral failing.'[210]

Ferencz's work confronts the stigmatization of trafficking and calls for law reform, declaring "social supplying is less morally blameworthy than commercial dealing."[211] She explains that many people who use drugs do not perceive social sharing as equivalent to trafficking and research indicates that social sharing produces harm reduction outcomes.[212] Social supply has been described as "practices of care"[213] because:

> social suppliers reduce the interactions that people who use drugs have with organized crime groups, reduce the risk of criminalization and police exposure for a

---

[206] Bernstein, *supra* note 21 at 21.
[207] Sarah Ferencz, "Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada" (2020) 43:5 Man LJ 197 at 198.
[208] Published in 2018.
[209] Hrymak, *supra* note 106 at 179.
[210] *Ibid* at 168.
[211] Ferencz, *supra* note 207 at 197.
[212] *Ibid*.
[213] Gillian Kolla & Carol Strike, "Practices of Care Among People Who Buy, Use, and Sell Drugs in Community Settings" (2020) 17:1 Harm Reduction 27 at 36.

> greater number of people who use drugs, and assist people who are addicted to drugs in getting access to the drugs they rely on in their daily lives.[214]

Ferencz recommends judges "use the language of social supply and minimally commercial supply in sentencing submissions to gradually challenge ideas about drug use and supply," to more accurately reflect and honour the "lived experiences of people who use drugs and the phenomenon of social supply."[215] Indeed, in *Lloyd*,[216] the SCC considered a reasonable hypothetical a social supplier, upholding a decision that MMPs for trafficking offences were unconstitutional and struck down. In this case, the court indicated "social supplying conduct is less morally blameworthy and deserving of punishment than other forms of trafficking."[217] This decision indicates a shift toward lessening the negative impacts associated with some forms of trafficking, despite the conduct continuing to be criminalized.

In this thesis, my focus is on sentencing as a discursive construction of crime and criminality and sentencing as a socially embedded discursive practice. This project is not about appropriateness of sentences, the over-representation of marginalized people in the criminal system, or the underlying values or ideologies of individual judges or lawyers. I am interested in how the concept of harm is constructed and the extent to which interpretations of harm are informed by evidence-based law. To facilitate this aim, I first present an overview of current research pertaining to drugs and harm.

1.2 PSYCHOACTIVE SUBSTANCES

In this section, I describe how drugs have become understood as a social construct and examine implications for a legal perspective. This is followed by a brief description of Canadian laws that regulate drugs. Current research and theories are introduced to facilitate examination of contemporary dominant constructions of drugs. Finally, I introduce considerations about the evidence-informed regulation of drugs.

---

[214] Ferencz, *supra* note 207 at 203.
[215] *Ibid* at 197.
[216] *R v Lloyd*, 2016 2016, 1 SCR 130, 2016 SCC 13, 2016 1 RCS 130, 2016 SCJ No 13, 2016 ACS no 13.
[217] Ferencz, *supra* note 207 at 218.

1.2.1 "Drugs"

The concept of drugs can be understood epistemologically as a social construct. Social constructs are "categories that have been established through the linguistic and conceptual conventions of a particular culture or society."[218] How drugs are categorized varies across different fields. For instance, in health discourses drugs tend to be dualistically categorized as either beneficial (e.g., medicinal, therapeutic, pharmaceutical) or as posing risk for harm or addiction (e.g., recreational, drugs of abuse). In Canadian law, drugs are categorized according to their legal status and how they are regulated.

Broadly speaking, drugs are psychoactive substances which "act on biologic systems at the chemical (molecular) level and alter their functions,"[219] encompassing a variety of substances (i.e., medicines, poisons, foods, drink) used in everyday life.[220] Each drug has unique properties that impact biological functions. Alcohol is a central nervous system (CNS) depressant that impacts memory processes, reasoning, and motor coordination.,[221] whereas caffeine is a CNS stimulant that increases energy and alertness.[222] At the same time, the effects of drugs are not exactly the same for each person and how a substance impacts a person is not always consistent. Drug effects can vary by a person's age, sex, age, overall health, presence of other substances, dose of the drug consumed, frequency of use, and so on. It is also well established that the efficacy of a drug is not solely dependent on psychoactive properties, but is impacted by individual expectations.[223] Factors like tablet shape, color, size, and brand influence perceived benefits of

---

[218] Kenneth W Tupper, "Psychoactive Substances and the English Language: Drugs, Discourses, and Public Policy" (2012) 39:3 Contemp Drug Probs 461 at 463 [Tupper].
[219] Bertram G Katzung, Marieke Kruidering-Hall, & Anthony J Trevor, "Introduction" in Bertram G Katzung, M Kruidering-Hall & A J Trevor, eds, *Katzung & Trevor's Pharmacology: Examination & Board Review,* 12th ed (New York: McGraw-Hill Education, 2019) at 2.
[220] South, Nigel, "Debating Drugs and Everyday Life: Normalisation, Prohibition and 'Otherness'" in Nigel South, ed, *Drugs: Culture, Controls, and Everyday Life* (Thousand Oaks: SAGE, 1999) 1 at 1.
[221] João Victor Vezali Costardi, et al, "A Review on Alcohol: From the Central Action Mechanism to Chemical Dependency" (2015) 61:4 Rev Assoc Med Bras 381.
[222] The Nutrition Source, "Caffeine" (2020) online: *Harvard TH Chan School of Public Health* https://www.hsph.harvard.edu/nutritionsource/caffeine/ [perma.cc/LJ4D-LMG8].
[223] Olesya Blazhenkova and Kivilcim Dogerlioglu-Demir, "The Shape of the Pill: Perceived Effects, Evoked Bodily Sensations and Emotions" (2020) 15:9 PloS One e0238378.

pharmaceuticals.[224] The effects of psychedelics, such as LSD and MDMA, are understood to be highly influenced by context, which has been known as set (expectations, frame of mind) and setting (environmental surroundings).[225]

Drugs have properties that are variably perceived as desirable/beneficial or adverse/harmful. Desired and adverse effects typically co-occur, though the effects may occur at different times. For instance, a person might enjoy the pleasurable[226] effects of alcohol and later suffer from a hangover. When regulated and medically prescribed, fentanyl is an effective analgesic. In the unregulated market, the dose and potency of fentanyl is unpredictable and it is often used to adulterate other drugs, which contributes to current high rates of opioid toxicity, with death rates averaging 22 people per day between January to June, 2023, in Canada.[227] Regardless of the therapeutic value of a drug or the legal status, there is a potential for the experience of *both* benefits and harms, as exemplified in Appendix A. In Appendix A, I provide an overview of contemporary

---

[224] *Ibid.*

[225] Robin L Carhart-Harris, et al, "Psychedelics and the Essential Importance of Context" (2018) 32:7 J Psychopharm 725.

[226] Pleasurable experiences, such as euphoric, happiness, excitement, and a sense of freedom.

[227] Government of Canada, "Opioid- and Stimulant-related Harms in Canada" (2024, December), online: <https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants/> ["Opioid- and Stimulant-related Harms"] [perma.cc/5E8S-B3RP]; also see Appendix A; Government of Canada, "Fentanyl" (2023), online: <https://www.canada.ca/en/health-canada/services/substance-use/controlled-illegal-drugs/fentanyl.html> [Government of Canada "Fentanyl"]; In 2022, it is reported that 7,328 people in Canada died due to opioid overdose, with 79% involving fentanyl [Government of Canada "Joint Statement from the Co-Chairs of the Special Advisory Committee on the Epidemic of Opioid Overdoses – Latest National Data on Substance-Related Harms" (26 June 2023) online: <https://www.canada.ca/en/public-health/news/2023/06/joint-statement-from-the-co-chairs-of-the-special-advisory-committee-on-the-epidemic-of-opioid-overdoses--latest-national-data-on-substance-related.html>]. These numbers are troubling and not unique to opioids. In 2018, alcohol was attributed to approximately 15,000 preventable deaths and in 2017, tobacco was attributed to 48,000 deaths [Government of Canada, "Original Quantitative Research – How Many Alcohol-Attributable Deaths and Hospital Admissions could be Prevented by Alternative Pricing and Taxation Policies? Modelling Impacts on Alcohol Consumption, Revenues and Related Harms in Canada" (10 June 2020) online: <https://www.canada.ca/en/public-health/services/reports-publications/health-promotion-chronic-disease-prevention-canada-research-policy-practice/vol-40-no-5-6-2020/alcohol-death-hospital-admissions-prevented-pricing-taxation-policies.html>; Government of Canada, "Tobacco and Premature Death" 26 July 2023) online: <https://www.canada.ca/en/health-canada/services/health-concerns/tobacco/legislation/tobacco-product-labelling/smoking-mortality.html> ["Tobacco and Premature Death"]]. For comparison, leading causes of death in 2022 include cancer (n=82,412), heart disease (n=57,357), COVID-19 (n=19,716), cerebrovascular diseases (n=13,915), chronic respiratory diseases (n=12,462), and diabetes (n=7,557) [as cited by Statistics Canada "Table 1 Top 10 Leading Causes of Death (2019 to 2022)" (27 November 2023) online <https://www150.statcan.gc.ca/n1/daily-quotidien/231127/t001b-eng.htm>].

literature about the effects of select drugs.[228] Analgesics (pain medications) and antidepressants are the most commonly prescribed types of drugs in Canada,[229] so I chose two pharmaceutical drugs commonly used for these purposes (acetaminophen, fluoxetine). I further selected three legally regulated substances (tobacco, alcohol, cannabis), and four controlled substances [fentanyl, cocaine, methamphetamine, 3,4-Methylenedioxy-Methamphetamine (MDMA)[230]]. Notably, fentanyl, MDMA, and cannabis have current medical and recreational applications.

What is particularly notable about the data presented in Appendix A is that each drug has the potential to positively and negatively impact health. Legally regulated drugs like alcohol and tobacco have high mortality rates, societal impacts, and economic costs; such impacts are not limited to drugs viewed more negatively in society, such as cocaine and fentanyl. Considering this research, researchers and people who use drugs have voiced critiques about the apparent arbitrariness of drug regulations, as penalties for possession and distribution do not align with empirical research regarding degree of risk[231] for personal and/or societal harms.[232]

---

[228] These substances were selected for representing diverse effects and for their likely familiarity to readers.
[229] Hales, Craig M, Jennifer Servais, Crescent B Martin & Dafna Kohen, "Prescription Drug Use Among Adults Aged 40–79 in the United States and Canada" (2019), online: https://www.cdc.gov/nchs/products/databriefs/db347.htm#:~:text=The%20most%20commonly%20used%20types%20of%20prescription%20drugs%20used%20by,and%20antidiabetic%20agents%20(6.6%25) [perma.cc/638F-QMD2].
[230] 3,4-Methylenedioxy-Methamphetamine is also referred to as MDMA, ecstasy, and molly.
[231] See David Nutt, *Drugs Without the Hot Air: Making Sense of Legal and Illegal Drugs*, 2nd ed (Cambridge: UIT Cambridge Ltd, 2020) [Nutt 2020], which empirically demonstrated alcohol is associated with more risks and harms than cannabis and the risks and harms associated with MDMA are less than those experienced in equestrianism (horseback riding for sport); See also David Nutt, "Equasy — an Overlooked Addiction with Implications for the Current Debate on Drug Harms" (2009) 23:3 Journal of Psychopharmacology 3.
[232] Nutt 2020, *supra* note 231; David J Nutt, Leslie A King & Lawrence D Phillips, "Drug Harms in the UK: A Multicriteria Decision Analysis" (2010) 376:9752 Lancet 1558 [Nutt 2010]; Note that one societal harm frequently considered in relation to drug use is the financial or economic cost. It is important to keep in mind that criminal justice costs are naturally higher when drugs are prohibited. While there may be relatively few crimes pertaining to conduct that arise as a consequence of the effects of drugs, enforcement and punitive costs nevertheless remain high. Criminal justice costs are a natural feature of restrictions and regulations to cultivation, importation, and trafficking. While these costs are a product of public demand to access prohibited drugs for personal use, the extent to which 'social harm' can be attributed to the effects of specific drugs warrants careful evaluation. For instance, criminal justice costs attributable to cannabis decreased 21.4% from 2007 to 2020. Following introduction of the *Cannabis Act* in 2018, criminal justice costs declined 13.5% by 2020, as a result of fewer incidents, charges, and admissions associated with cannabis possession. As noted in Appendix A, societal cost of alcohol was estimated at $14.6 billion in 2014. Yet, as a regulated drug, it is also subject to taxation and federal and provincial governments generated $15.2 billion in the 2021-2022 fiscal year.

Laws that regulate drugs in Canada are discussed in the next section. It becomes apparent there is little congruence between objective risk for harm (as summarized in Appendix A) and penalties associated with production, distribution, and possession. The criminalization, decriminalization, and legal regulation of drugs in Canada today relates to various national and international social, political, and economic influences over the past two centuries.[233] Contemporary knowledge available through empirical research over the past several decades reveals inconsistencies between the intent of Canadian sentencing principles to serve as reparations for harms and empirical evidence of harm associated with specific drugs.

1.2.2 Drug Laws in Canada

Contemporary drug laws are a product of historical and social circumstances, shaped by national and international interests. Regulation of substances using criminal law was first introduced in Canada in 1908 and other regulatory laws followed.[234] Governance of most drugs known today fall under one of these four federal Acts:

- *Controlled Drugs and Substances Act*[235]
- *Cannabis Act*[236]
- *Food and Drugs Act* [*FDA*][237]
- *Tobacco and Vaping Products Act* [*TVPA*][238]

---

[233] It is beyond the scope of these thesis to describe the historical development of current law. This topic has been discussed by other authors, such as: Susan C Boyd, *Busted: An Illustrated History of Drug Prohibition in Canada*. (Winnipeg: Fernwood, 2017); Susan C Boyd & Carter Connie, *Killer Weed: Marijuana Grow Ops, Media, and Justice* (Toronto: University of Toronto Press, 2018); Catherine Carstairs, *Jailed for Possession: Illegal Drug Use, Regulation, and Power in Canada, 1920-1961* (Toronto: University of Toronto Press, 2017); Erika Dyck, "Canada Dry or High Times?: A Historiographical Look at Drugs and Alcohol in Canada" (2021) 102:2 Can Hist Rev 339; MacFarlane, *supra* note 126; Dan Malleck, *When Good Drugs Go Bad: Opium, Medicine, and the Origins of Canada's Drug Laws*, (Vancouver: UBC Press, 2015); Montigny, Edgar-André, *The Real Dope: Social, Legal, and Historical Perspectives on the Regulation of Drugs in Canada* (Toronto: University of Toronto Press, 2017); Mariane Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom,* (Cambridge: Cambridge University Press, 1998).
[234] *An Act to Prohibit the Importation, Manufacture and Sales of Opium for other than Medicinal Purposes*, SC 1908, c 50.
[235] *CDSA, supra* note 95.
[236] *Cannabis Act,* SC 2018, c 16, LC 2018, ch 16 [*Cannabis Act*].
[237] *Food and Drugs Act*, RSC 1985, c F-27, LRC 1985, ch F-27 [*Food and Drugs Act*]; *Food and Drug Regulations*, CRC, c 870 [*Food and Drug Regulations*].
[238] *Tobacco and Vaping Products Act*, SC 1997, c 13, LC 1997, ch 13 [*Tobacco and Vaping Products Act*].

In this section, I describe the *CDSA* in more detail than the *Cannabis Act*, the *FDA*, or the *TVPA*, because the *CDSA* is most relevant to this specific project. I include a brief overview of the other Acts to demonstrate that psychoactive substances are variably regulated in Canada.

1.2.2.1 Controlled Drugs and Substances Act

The *Controlled Drugs and Substances Act* (*CDSA*) Act defines what constitutes criminal activity and the appropriate penalties associated with the production, possession, and distribution of specific drugs. It was adopted by Parliament in 1997 and replaced the *Narcotics Control Act* (*NCA*) and parts of the *FDA*, with regard to regulating controlled substances.[239] The NCA governed over 120 drugs, such as cocaine, heroin, opium, and cannabis; criminal penalties were the same for all drugs. The *FDA* included "controlled drugs" such as amphetamines, barbiturates, testosterone, and "restricted drugs," such as LSD and other hallucinogenic drugs, with lower criminal penalties than the *NCA*.[240]

Although not stated explicitly, it appears Sections 10.1-10.7 of the *CDSA* are meant to apply to people who are identified to engage in "problematic substance use"[241] and community services providers who intend to lawfully dispose of a controlled substance, which is a narrow scope of possible offences.[242]

In the *CDSA*, drugs are classified into different Schedules; all drugs listed in the Schedules are referred to as a controlled substance. Certain drugs listed in the *CDSA* are approved for pharmaceutical use in Canada, such as codeine (Schedule I) and benzodiazepines (Schedule IV). Possession is illegal for drugs listed in Schedules I-III; however, for substances that have therapeutic uses, there are legal regulations that permit production, possession, and distribution. Codeine, for instance, is available as an over-

[239] Government of Canada, "Drug Use and Offending. Q1. How Has Drug Legislation Changed Recently?" (26 August 2022), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/qa02_2-qr02_2/p1.html> [perma.cc/GWZ6-2JSC].
[240] *Ibid.*
[241] *CDSA, supra* note 95 s 10.1(a).
[242] *Ibid,* s 10.7.

the-counter medication from a pharmacy despite being a Schedule I controlled substance. Trafficking, possession for the purpose of trafficking, and production are prohibited for drugs listed in Schedules I-IV. Importing and exporting are prohibited for drugs listed in Schedules I-VI.[243] There is little to no government transparency regarding the criteria according to which drugs are classified.

In 2021, there were 61,798 reported drug offences for controlled substances.[244] The number of possession charges were: 1,254 for cannabis; 5,135 for cocaine; 8,120 for methamphetamine; 146 for ecstasy; 1,320 for heroin; 4,029 for opioids (not heroin); 5,079 for other drugs. In this section, I will briefly describe factors and principles that influence sentencing in Canada. The severity of sentencing depends, in part, on the classification of drugs in the *CDSA*. Breaches of conduct related to Schedule I drugs are associated with the heaviest penalties. Severity of penalties descends from Schedule II, III, and IV. For instance, when contravening the prohibition from obtaining a controlled drug, the penalties for indictable offences vary as follows:

> (i) to imprisonment for a term not exceeding seven years, where the subject-matter of the offence is a substance included in Schedule I
>
> (ii) to imprisonment for a term not exceeding five years less a day, where the subject-matter of the offence is a substance included in Schedule II
>
> (iii) to imprisonment for a term not exceeding three years, where the subject-matter of the offence is a substance included in Schedule III
>
> (iv) to imprisonment for a term not exceeding eighteen months, where the subject-matter of the offence is a substance included in Schedule IV[245]

There is a high degree of discretion as to whether or not charges are laid for personal possession of a controlled substance. Under 5.13 of the *Public Prosecution Service of Canada Deskbook*:

> Criminal sanctions, as a primary response, have a limited effectiveness as (i) specific or general deterrents and (ii) as a means of addressing the public safety concerns

[243] Clayton Ruby, et al, *Sentencing,* 9th ed (Toronto: LexisNexis Canada, 2017) [Ruby].
[244] Statistics Canada, "Table 9 Police-Reported Crime for Selected Drug Offences, Canada, 2020 and 2021" (2022), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00013/tbl/tbl09-eng.htm> [perma.cc/ES2E-TCPF].
[245] *CDSA, supra* note 95 s 4(7).

> when considering the harmful effects of criminal records and short periods of incarceration.[246]

Principles of *discretion* require considering the potential ineffectiveness of charges to deter future behaviour, while in other instances there is an awareness that a charge could have long term negative impacts on the person incongruent with the severity of their actions. As of 2022, this requirement of discretion entered the *CDSA*, with a requirement to consider alternative options toward diversion and is discussed more in the following section. If an offence is viewed as relatively minor, with little risk of harm to others, first-time offence, and if the offence did not co-occur with another offence (e.g., break and enter), the enforcement officer might simply verbally warn the person against engaging in the conduct in the future.[247] Penalties can involve incarceration, conditional sentences, and/or probation and fines.

Section 10.2 (1) of the *CDSA* provides the option for warnings and referral:

> A peace officer shall, instead of laying an information against an individual alleged to have committed an offence under subsection 4(1), consider whether it would be preferable, having regard to the principles [of evidence-based diversion measures] set out in section 10.1, to take no further action, to warn the individual or, with the consent of the individual, to refer the individual to a program or to an agency or other service provider in the community that may assist the individual.[248]

Section 10.1 of the *CDSA* is expected to "to protect the health, dignity and human rights of individuals who use drugs and to reduce harm to those individuals, their families and their communities," decrease social stigma, promote access to interventions that aim to address the root causes of problematic substance use, and more appropriately allocate judicial resources.[249]

---

[246] Public Prosecution Services of Canada, "5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act" (17 August 2020), online: *Public Prosecution Service of Canada Deskbook* <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html> [perma.cc/PZZ4-TT8V].
[247] Alissa Greer et al, "Police Discretion to Charge Young People Who Use Drugs Prior to Cannabis Legalization in British Columbia, Canada: A Brief Report of Quantitative Findings" (2020) 27:6 Drugs: Edu, Prevention & Policy 488.
[248] *CDSA, supra* note 95 s 10.2 (1).
[249] *CDSA, supra* note 95 s 10.1 (b).

Despite the addition of Sections 10.1-10.7, prohibitionist approaches have not been entirely repealed. The *CDSA* relies heavily on deterrence through law enforcement strategies and criminal charges.

Section 4(3) still includes the definition of penalties as follows:

> Every person who contravenes subsection [4](1) where the subject-matter of the offence is a substance included in Schedule I
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or
>
> (b) is guilty of an offence punishable on summary conviction and liable
>
> (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and
>
> (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.[250]

There are some exemptions to the *CDSA*, which were established to promote health and wellbeing, three of which are discussed here. The *Good Samaritan Drug Overdose Act* was enacted in 2017[251] to decriminalize simple possession at the scene of an overdose event and to prevent charges for breaches of conditions. This was enacted in response to a reluctance among members of the public to request emergency services based on "concerns surrounding police attendance at overdose events and possession of drugs or paraphernalia, unwanted surveillance, being arrested for outstanding warrants and/or misdemeanors, being identified as a homicide suspect, being involved in drug supply investigations, and having housing compromised."[252]

Another exemption pertains to organizations similar to PHS Community Services Society in Vancouver, an organization that runs the InSite supervised safe drug injection facility. PHS was granted an exemption to the *CDSA*, which was appealed by the federal

---

[250] *CDSA, supra* note 95 s 4(3).

[251] *Good Samaritan Drug Overdose Act*, SC 2017, c 4. This Act was supported by Jane Philpott, the Minister of Health and Justice, as a harm reduction strategy, in The Honourable Jane Philpott, "Government Response to the Report of the Standing Committee on Health Entitled: Report and Recommendations on the Opioid Crisis in Canada" (nd) online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/HESA/report-6/response-8512-421-134> [perma.cc/W3UM-A8EG].

[252] Jessica Xavier, et al., "'There Are Solutions and I Think We're Still Working in the Problem': The Limitations of Decriminalization Under the Good Samaritan Drug Overdose Act and Lessons from an Evaluation in British Columbia, Canada." (2022) 105 Intl J Drug Policy 103714 at 3.

government and heard by the SCC.[253] This exception was upheld, noting that Section 56 of the *CDSA* acted as a "safety valve," meaning "the limitation was not arbitrary, disproportionate in its effects, or overbroad.[254] This exemption decriminalizes personal possession of illicit substances within particular boundaries.[255] Under section 56(1) of the *CDSA*, "the Federal Minister of Health has the authority to exempt any person, or class of persons, or any controlled substance from the *CDSA*. The exemption can only be granted under one of the grounds: (1) Necessary for a medical purpose; or (2) Necessary for a scientific purpose; or (3) Otherwise in the public interest."[256]

Remarkably, under the *CDSA,* British Columbia was granted a three-year exemption, from January 31, 2023 to January 31, 2026 to remove criminal penalties for possess of small amounts of specific illicit substances for personal use.[257] Even prior to this exemption, research indicated that depenalization was the de facto enforcement response to simple possession.[258] Under the *CDSA* exemption, police will no longer seize drugs in a person's possession when the combined total is 2.5 grams or less and the person is expected to be provided information about available addiction and health services.[259] Calls for decriminalization have been put forward in Ontario, with several major cities proposing decriminalization of drugs.[260] On January 4, 2022, Toronto Public Health

---

[253] *Providence Health Care Society v Canada (Attorney General),* 2014 BCJ No 1058, 2014 BCSC 936 [*PHS v Canada*]
[254] Cameron Ward, "Canada (AG) v. PHS Community Services Society — The Insite Decision" (2012) 50:1 Alberta L Rev 195 at 201.
[255] M Janz, "Controlled Drug and Substances Act Section 56(1) Exemption Process" (Report: OCM01092) online: <https://pub-edmonton.escribemeetings.com/filestream.ashx?DocumentId=141862> [perma.cc/DL2H-A5NJ].
[256] *Ibid* at 2.
[257] BC Gov News, "BC Receives Exemption to Decriminalize Possession of Some Illegal Drugs for Personal Use" (31 May 2022), online: <https://news.gov.bc.ca/releases/2022MMHA0029-000850> [perma.cc/J6R8-PPLT]; To understand how this aligns with international conventions, see Health Canada Expert Task Force on Substance Use, "Drug Decriminalization and International Law" (March 2021) online: <https://www.drugpolicy.ca/wp-content/uploads/2021/03/HLN_Brief-ETSU-Decrim-intllaw-Mar2021.pdf> [https://perma.cc/JQ68-FGJJ].
[258] Greer, *supra* note 247.
[259] Sarah Aziz, "There Are Growing Calls for Drug Decriminalization. Could It Solve Canada's Opioid Aziz, Sarah, "There Are Growing Calls for Drug Decriminalization. Could It Solve Canada's Opioid Crisis?" (9 November 2021), online: *Global News* <https://globalnews.ca/news/8359890/drug-decriminalization-opioid-crisis/> [perma.cc/VF9J-P868].
[260] *Ibid.*

requested decriminalization of simple possession of all drugs.[261] This thesis only includes judicial decisions prior to British Columbia being granted an exemption under the *CDSA*; future research will be warranted to understand how harm is represented in criminal law during this three-year period.

1.2.2.2 Cannabis Act

Prior to the *Cannabis Act*, cannabis (marihuana) was classified in the *CDSA* as Schedule II drug.[262] The *Cannabis Act* came into force in October 2018 under the newly elected Liberal government. This Act defines what constitutes criminal activity and penalties associated with the production, possession, and distribution of cannabis. Prohibitions are outlined as they pertain to promotion, packaging, labelling, and displaying of products.

Under the *Cannabis Act*, adults are permitted to purchase dried or fresh cannabis and cannabis oil from a government licensed retailer or producer (referred to as 'legal cannabis'), possess up to 30 grams of legal cannabis,[263] share up to 30 grams of legal cannabis with other adults, grow up to four cannabis plants per residence for personal use from licensed seed or seedlings, and make cannabis products (food and drinks) at home. Cannabis edible products are legal for sale.[264]

The stated purpose of the *Cannabis Act* is to protect public health and safety. The *Cannabis Act* is aimed at mitigating harm through multiple approaches. One is to restrict

---

[261] Toronto Public Health, "Exemption Request" (4 January 2022), online: <https://www.toronto.ca/wp-content/uploads/2022/01/943b-TPH-Exemption-Request-Jan-4-2022-FNLAODA.pdf> [perma.cc/527H-WNXH].
[262] *CDSA, supra* note 95*,* Version of document from 2018-10-17 to 2019-05-14, online: <https://laws-lois.justice.gc.ca/eng/acts/c-38.8/20181017/P1TT3xt3.html> [perma.cc/24J6-UK87].
[263] Government of Canada, "Cannabis Legalization and Regulation" (2021), online: <https://www.justice.gc.ca/eng/cj-jp/cannabis/> [perma.cc/F3UC-FQ4J].
[264] In 2018, Quebec legislature enacted the *Cannabis Regulation Act*, prohibiting the possession and cultivation of cannabis plants in a personal residence "to prevent and reduce cannabis harm in order to protect the health and security of the public and of young persons in particular" (*Cannabis Regulation Act*, C-5.3 ch I.1). Cannabis sales in Canada are restricted to the Société québécoise du cannabis. It was decided in *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10 that prohibiting possession and cultivation of cannabis in personal homes would "help to ensure the effectiveness of the state monopoly and thus to protect the health and security of the public" at 8.

access and inducements to persons under 18 years old. A second is to deter illegal activities by simultaneously regulating licit production and implementing sanctions and enforcing penalties for breaches to the *Cannabis Act*. A third is to improve public awareness about potential health risks. The *Cannabis Act* is expected to reduce "burden on the criminal justice system in relation to cannabis"[265] and provide the public with a supply of cannabis subject to quality control.

Indictable offences of individuals 18 years of age or older who exceed limits for personal possession can result in penalties of imprisonment up to five years less a day and a fine at the discretion of the court. Penalties for possession for the purpose of selling[266] and importation and exportation[267] increase to a period of incarceration of not more than 14 years.

Since the *Cannabis Act* came into effect, the social acceptability of cannabis has increased and there is a heightened perception of harmlessness.[268] There is a slight increase in prevalence of use overall and, in 2020, the prevalence of use by women became comparable to men for the first time.[269] Evidence suggests that people are now more likely to purchase cannabis through a legal source.[270]

1.2.2.3 Food and Drugs Act and Food and Drug Regulations

Health Canada is the federal regulator that makes decisions regarding which drugs are approved under the *Food and Drugs Act* (FDA) and regulated by *Food and Drug Regulations* (FDR).[271] The *FDA* outlines expectations around the manufacturing, packaging, labelling, storage, importation, distribution, and sales of foods, prescription

---

[265] *Ibid* at Section 7
[266] *Ibid* at Section 10(5).
[267] *Ibid* at Section 11(3).
[268] Michelle Rotermann, "Looking Back from 2020, how Cannabis Use and Related Behaviours Changed in Canada" (21 April 2022), online: *Health Reports* <https://www150.statcan.gc.ca/n1/pub/82-003-x/2021004/article/00001-eng.htm> [perma.cc/7AHR-H5VH].
[269] *Ibid.*
[270] *Ibid.*
[271] Government of Canada, *Drugs and health products* 2022 Online <https://www.canada.ca/en/health-canada/services/drugs-health-products.html<

drugs, and non-prescription drugs. The first psychoactive substances to enter the *FDR* were thalidomide and lysergic acid diethylamide (LSD) in 1962.[272] In 1997, portions of the *FDR* were repealed and transferred to the *CDSA*, as noted previously.[273]

The *FDA* currently regulates the manufacture and sale of food and drugs, with the exception of tobacco and vaping products. Alcohol is regulated as a food in Part B, Division 2. Two factors addressed in this Act are quality control and risk for harm. Prohibitions are outlined as they pertain to advertising, deception, and misleading information.

Certain drugs, including some listed under the *CDSA*, are approved for pharmaceutical use in the treatment or prevention of disease or illness and improvement or maintenance of health or wellbeing. Health Canada is the federal regulator that makes decisions regarding which drugs are approved under the *FDA* and regulated by *Food and Drug Regulations* (*FDR*).[274]

In Canada, many laws specific to alcohol are regulated under provincial *Liquor Control Acts*. In most provinces and territories, the legal age to purchase, possess, or consume alcohol is 19 years old, with the exceptions of Quebec, Manitoba, and Alberta where the legal age is 18 years old. It is generally prohibited to sell or supply alcohol to a young person, unless the person providing the alcohol is the legal guardian and it is consumed in the home.[275] Production, packaging, and selling alcohol requires the person to obtain a licence.[276] There are exceptions that permit people to brew beer and make wine at home

[272] SC 962-63, c 15, 1968-69, c 41.
[273] Ruby, *supra* note 243.
[274] *Food and Drug Regulations*, CRC, c 870.
[275] Province of British Columbia, "LCRB frequently asked questions" (2023,) online: <https://www2.gov.bc.ca/gov/content/employment-business/business/liquor-regulation-licensing/liquor-licence-permits/liquor-resources-information/lcrb-faq#:~:text=It%20is%20generally%20against%20the,dentist%20for%20medical%20purposes%2C%20or>
[276] Government of Canada, "Producers and Packagers of Spirits" (October 2022), online: *Canada Revenue Agency* < https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edm3-1-1/producers-packagers-spirits.html>; Government of Canada, "Producers and Packagers of Wine" (June 2022), online: *Canada Revenue Agency* <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edm4-1-1/producers-packagers-wine.html>.

for personal consumption and there are laws that allow fermentation on site as part of a business.[277]

Under 21.6 of the *FDA,* if a person knowingly makes false or misleading statements or provides false or misleading information about a therapeutic product, this can result in penalties of imprisonment up to five years. Depending on the section contravened and term of imprisonments, fines can be as high as $5,000,000.[278]

1.2.2.4 Tobacco and Vaping Products Act

In 2018, the *Tobacco Act* was renamed as the *Tobacco and Vaping Products Act*. The *TVPA* regulates the manufacture and sales of tobacco. Prohibitions are outlined as they pertain to promotion, packaging, labelling, and displaying of products. Adults are permitted to possess tobacco and vaping products produced and sold by approved sources. The trafficking and possession of 'contraband tobacco' is illegal.[279]

The *TVPA* is described as a "legislative response to a national public health problem of substantial and pressing concern."[280] The purpose of the *TVPA* is to protect the health of Canadians in the face of "conclusive evidence"[281] that tobacco use is a causal factor of many debilitating illnesses and fatal diseases. With respect to both vaping and tobacco products, the *TVPA* is intended to protect the health of persons under 18 years old and prevent tobacco or nicotine dependence by restricting access. *TVPA* is aimed at improving public awareness about health hazards and preventing "the public from being deceived or misled" about risks.[282]

---

[277] See e.g., Ferment-on-Premises Regulations made under Section 50 of the *Liquor Control Act* R.S.N.S. 1989, c. 260 O.I.C. 2014-441 (October 28, 2014), N.S. Reg. 164/2014.
[278] *FDA* at section 31.2 (1).
[279] Government of British Columbia, "Buying and Selling Illegal Tobacco" (2021), online: <https://www2.gov.bc.ca/gov/content/taxes/sales-taxes/tobacco-tax/illegal-tobacco>
[280] *Tobacco and Vaping Products Act* at 4.
[281] *Ibid* at 4.
[282] *Ibid* at 5.

Penalties for contravening the *TVPA* may include prohibitions from selling tobacco products and vaping products for a period of time, pay an amount determined by the Court, and/or pay an amount toward research about tobacco products and vaping.[283]

1.2.2 Dominant Constructions of Drugs

It is important to understand that the legal or medical status of any given drug is not fixed or predetermined. I provide some brief examples here. Substances like coffee, cacao, tobacco, and distilled alcohol were originally introduce into Western cultures for perceived medical properties.[284] In Canada, cannabis was a controlled substance under the *CDSA* until 2018 when the *Cannabis Act* came into force. Alcohol was variably prohibited throughout regions of Canada, most comprehensively between 1917 and 1920.[285] Alcohol prohibitions in Canada uniquely and inequitably targeted Indigenous people; for instance, an amendment to the *Indian Act* in 1883 prohibited Indigenous people from purchasing or consuming alcohol and from entering a licensed establishment.[286] It was also illegal to sell alcohol to an Indigenous person.[287] More globally, coca leaves and its derivatives are variably regulated around the world.[288] However, near the end of the 1800s coca was widely accepted and in 1886 Coca-Cola was created with coca leaves as an ingredient, a practice followed by more than 40 other soft drinks.[289] Opium had been a common household item in the 1800s, used to treat

---

[283] *Ibid* section 59.
[284] Tupper, *supra* note 218.
[285] Emily Russell, "Canada's Boozy History" (2023), online: *Cranbrook History Centre* <https://www.cranbrookhistorycentre.com/canadas-boozy-history/> [perma.cc/TN59-R5C5].
[286] Indigenous Corporate Training Inc, "A Look at First Nations Prohibition of Alcohol" (20 Oct 2016), online: <https://www.ictinc.ca/blog/first-nations-prohibition-of-alcohol#:~:text=Due%20to%20an%20amendment%20to,alcohol%20to%20an%20Indian%20person.> [perma.cc/B535-TJRE].
[287] In 2021, a traditional Anishinaabe law on alcohol possession, *Alcohol Inagonigaawin*, was introduced, combining mainstream and traditional justice processes in relation to transporting excessive amounts of alcohol onto Grass Narrows First Nation, reported by Logan Turner, "Grassy Narrows First Nation Asserts Sovereignty to Pass Anishinaabe Law on Alcohol Use" (5 May 2021), online: <https://www.cbc.ca/news/canada/thunder-bay/grassy-narrows-traditional-law-alcohol-1.6013562> [perma.cc/BK3H-PCYU].
[288] Ranging from legalized for possession or cultivation, decriminalized, legal for medical use, or criminalized.
[289] Merrill Singer, *Something Dangerous: Emergent and Changing Illicit Drug Use and Community Health* (Long Grove: Waveland Press Inc, 2006).

minor ailments like toothache and indigestion, with no remarkable evidence of personal harm or social criminality.[290] Even tobacco has been partially criminalized in some parts of the world. For example, in Bhutan, the *Tobacco Control Act*, 2010[291] prohibited cultivation, manufacture, supply and sale of tobacco products, though it did not go as far as prohibiting consumption.[292] Smoking was viewed as "reprehensible regardless of whether it was viewed from a religious or a public health lens."[293]

What these examples demonstrate is that the legal status of a drug is not fixed and is subject to ever-shifting, diverse societal and legal factors. When considering 'drugs' as a social construction, important questions are asked of the criminal law:

- Which psychoactive substances are criminalized?
- Which psychoactive substances are *not* criminalized?
- What criteria are used to determine the penalties associated with controlled substances?
- What evidence is used to inform drug laws?
- Whose perspectives and values are included or excluded in decision making?
- Which populations are most likely to be negatively impacted by drug laws?

In this thesis, I bring attention to drug laws *as* social constructions, from which judges form and articulate their decisions. It is beyond the scope of this thesis to answer these questions, though there is extensive research and policy work underway examining the potential negative impacts of the criminalization of drugs.[294]

---

[290] *Ibid.*
[291] Amended in 2021, lifting the ban on tobacco sales.
[292] Evans-Reeves, Karen, "Bhutan reverses sales ban on tobacco" (1 Feb 2023), online: <https://blogs.bmj.com/tc/2023/02/01/bhutan-reverses-sales-ban-on-tobacco/#:~:text=In%202010%2C%20Bhutan%20was%20lauded,of%20tobacco%20within%20the%20country> [perma.cc/E7HR-JEXT].
[293] *Ibid* at para 2.
[294] See e.g. Health Canada Expert Task Force on Substance Use, "Report #1 Recommendations on Alternatives to Criminal Penalties for Simple Possession of Controlled Substances" (6 May 2021), online: <https://www.canada.ca/en/health-canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/expert-task-force-substance-use/reports/report-1-2021.html> ["Health Canada Expert Task Force Report #1]"; Health Canada Expert Task Force on Substance Use, "Report #2 Recommendations on the Federal Government's Drug Policy as Articulated in a Draft Canadian Drugs and Substances Strategy (CDSS)" (11 June 2021), online: <https://www.canada.ca/en/health-canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/expert-task-force-substance-use/reports/report-2-2021.html> ["Health Canada Expert Task Force Report #2"]; Global Commission on Drug Policy, "Time

Toby Seddon explains, "our existing drug-control system is just one branch created out of a wider regulatory tree covering *all therapeutic and psychoactive substances*" [emphasis added].[295] While he contends, "To accept and work with the notion of 'drugs' is, to a certain extent, to accept the existing system of regulatory branches,"[296] this does not mean that such categorizations cannot simultaneously be confronted and contested. I argue that neglecting to analyze drugs as a broad categorization that includes psychoactive substances risks artificially positioning certain drugs as inherently more or less socially accepted based on historical and hegemonic ideologies grounded in moralistic and racist policies, rather than informed by evidence. At minimum, it must be recognized that the categorization of drugs according to the various Acts are fluid and amenable to change.

Internationally, drugs are used extensively. The United Nations Office on Drugs and Crime provides estimates past-year use of substances in 2020 as follows[297]: 209 million used cannabis, 61 million used opioids, 34 million used methamphetamine, 21 million used cocaine, and 20 million used ecstasy.[298] Unfortunately – and largely propagated through the decades-long war on drugs mandate – the majority of research about non-

---

to End Prohibition" (2021), online: <https://www.globalcommissionondrugs.org/wp-content/uploads/2021/12/Time_to_end_prohibition_EN_2021_report.pdf> [perma.cc/DC92-5TC5] [Global Commission on Drug Policy]; S M Rodriguez, Liat Ben-Moshe & H Rakes, "Carceral Protectionism and the Perpetually (in)Vulnerable" (2020) 20:5 Criminology & Crim Just 546; Sorenson, Kevin, "Mental Health and Drug and Alcohol Addiction in the Federal Correctional System: Report of the Standing Committee on Public Safety and National Security" (December 2010), online: *House of Commons Canada* <https://www.ourcommons.ca/Content/Committee/403/SECU/Reports/RP4864852/securp04/securp04-e.pdf> [perma.cc/F42E-LXRR]; Howard Sapers, "Annual Report of the Office of the Correctional Investigator 2013-2014" (27 June 2014), online: *Office of the Correctional Investigator* <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx>; Jade Boyd, Danya Fast, Megan Hobbins, Ryan McNeil & Will Small, "Social-Structural Factors Influencing Periods of Injection Cessation among Marginalized Youth Who Inject Drugs in Vancouver, Canada: An Ethno-Epidemiological Study" (2017) 14 Harm Reduction J 530; Shelley Trevethan & Christopher J Rastin, "A Profile of Visible Minority Offenders in the Federal Canadian Correctional System" (June 2004), online: *Correctional Service of Canada* <https://www.csc-scc.gc.ca/research/092/r144_e.pdf> [perma.cc/7V7V-G3UJ]; Bryan Warde, "Black Male Disproportionality in the Criminal Justice Systems of the USA, Canada, and England: A Comparative Analysis of Incarceration" (2013) 17:4 J Afr Am Studies at 461; Office of the Correctional Investigator, "Aboriginal Offenders - A Critical Situation" (16 September 2013), online: <https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>

[295] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (New York: Routledge, 2010) at 113.

[296] *Ibid*.

[297] Prevalence of use impacted by COVID restrictions.

[298] United Nations Office on Drugs and Crime, "World Drug Report 2022" (2022), online: <https://www.unodc.org/unodc/en/data-and-analysis/wdr-2022_booklet-2.html> [perma.cc/LD8X-WERK].

pharmaceutical drugs has drawn participants from populations recruited through legal and health systems, overlooking non-problematic substance use. This skews societal understandings about drugs and potentially exaggerates risk for harm associated with particular drugs. Adverse effects from drug use are associated with marginalization and factors such as mental illness, developmental delay, poverty, and colonization.

It is pertinent to recognize the potential for drugs, including Schedule I drugs, to be used in controlled ways. Colleagues and I have examined drug use by Canadian professionals and students in professional programs. We found that professionals and students currently use or have used drugs like cocaine, cannabis, and psychedelics and that the reported prevalence of use typically exceeds national rates.[299] At the same time, our participants reported deliberate efforts to use drugs in ways which mitigate adverse consequences at home and at work. As I have noted, "This population benefits from protective factors that mitigate the potential for negative consequences or harms associated substance use, such as higher social capital, higher baseline health, and access to education to make rational decisions about substance use, financial resources to afford the cost of substances, supportive social networks, and ownership of private homes to use discretely and outside the public eye."[300]

In a shift away from drug use models predicated on risk and harm, Health Canada recently formally acknowledged the potential for drugs to be used in ways that are beneficial and low risk, as depicted in Figure 1.

[299] Niki Kiepek & Christine Ausman, "'You are You, but You are Also Your Profession': Nebulous Boundaries of Personal Substance Use" (2023) 50:1 Contemp Drug Prob 63; Niki Kiepek, et al, "Substance Use by Social Workers and Implications for Professional Regulation" (2019) 19:2 Drugs Alcohol Today 147; Niki Kiepek, Brenda Beagan & Jonathan Harris, "A Pilot Study to Explore the Effects of Substances on Cognition, Mood, Performance, and Experience of Daily Activities" (2018) 6:1 PEH 3.
[300] Niki Kiepek, "Contextualising Substance Use among Professionals in Canada" in Katinka van de Ven, Kyle J D Mulrooney & Jim McVeigh, *Human Enhancement Drugs*, vol 2 (UK: Routledge, forthcoming in 2023).

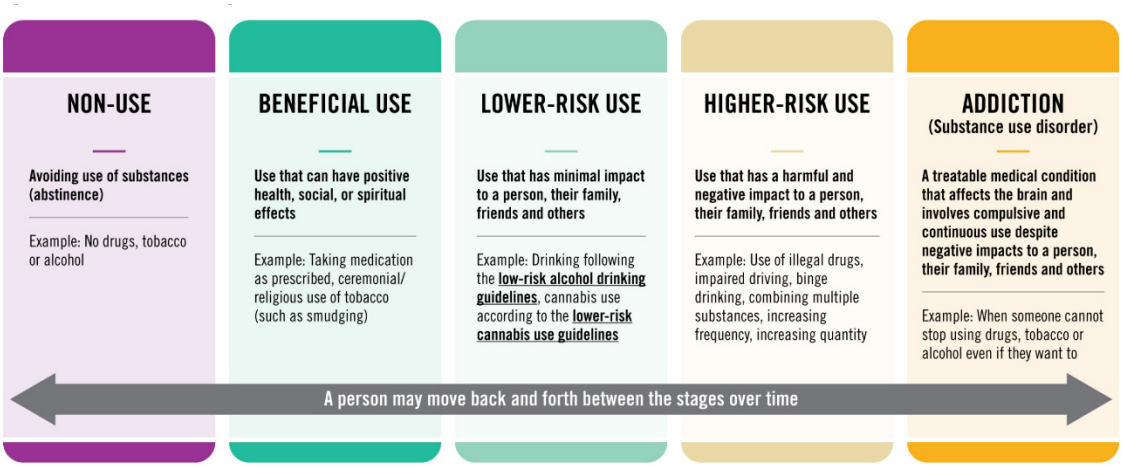

Figure 1: Substance Use Spectrum[301]

Stereotypes about drugs impact the legal regulation of drugs, resulting in laws disconnected from actual risks for harm or potential for controlled use. Information provided in Appendix A reinforces the potential for harms *and* benefits to be experienced in relation to drugs, regardless of their legal status. As observed, tobacco and alcohol account for more deaths than other substances, but remain legally regulated; whereas MDMA, which is not attributed to any deaths (when adulterants are not present), remains classified as a Schedule 1 drug. Seddon challenges us to consider that "The principal conceptual difference between, say alcohol and heroin is that they are regulated under completely separate regimes, rather than that they are substances of a fundamentally different kind from one another."[302] Many risks associated with the illicit production of drugs arise from uncertain and inconsistent potency and purity. With drugs like alcohol, regulations around maximum strength and accurate labelling are harm reduction strategies designed to prevent instances of alcohol poisoning and death.

[301] Government of Canada, "Substance Use Spectrum" (2023), online: <https://www.canada.ca/en/health-canada/services/substance-use/about-substance-use.html>.
[302] Seddon, *supra* note 295 at 132.

Tupper argues that, in Canadian society, drugs tend to be viewed according to informal categories of i) 'drugs' and illegal substances, ii) non-drugs (i.e., alcohol, tobacco), and iii) medicines. He refers to this as a stereotypology that "illustrate[s] how today's dominant public and political (and often, by extension, academic and professional) discourses sustain an ideological frame that contributes to the stigmatization and human rights violations of vulnerable individuals and populations."[303] The concept of 'drugs,' in this narrowed definition, is not simply a categorization. It is an "'evaluative' concept, carrying with it a set of moral judgments – about the nature of the substances that come under its umbrella and about the character of the people that consume them."[304] Such judgments are shaped by factors including the regulatory status of the substance and moral perspectives.[305] Within national and international drug control regimes and policies, drugs tend to be constructed as "malevolent agents" and an "intrinsically evil force, like a demon or wild creature, possessing its own nefarious volition and the capacity to subjugate or override the free will of 'weak' or 'immoral' individuals."[306] Constructing drugs as malevolent agents has significant implication for individuals who are impacted by the resultant laws and policies, as reflected here:

> The drugs as malevolent agents metaphor suggests that the drug itself is a diabolical force with talismanic or magical power to subjugate the will: even being in its proximity is dangerous, simple possession is reprehensible, distribution or sale is nefarious, and any indication of such transgressions merits swift and forceful preventive or punitive intervention. Imprisonment, isolation, banishment, or other forcible confinement or exclusion are-by logical implication and, in many jurisdictions, conventional practice appropriate responses to a person who transgresses legal or moral codes with offences involving proscribed psychoactive substances…. The drugs as malevolent agents metaphor continues to inform dominant public and political discourses, and serves as the primary policy frame for a range of coercive or punitive policies and practices, including imprisonment, fines, eviction, expulsion from school, denial of employment, and in some countries corporal or capital punishment.[307]

Moral judgment about drugs is highly interconnected with stigmatization of people who use particular drugs in particular ways. In health discourses, there is a disproportionate

---

[303] Tupper, *supra* note 218 at 474.
[304] Seddon, *supra* note 295 at 132.
[305] *Ibid*; includes moral perspectives related notion of pleasure, autonomy, race, citizenship, and so on.
[306] Tupper, *supra* note 218 at 475.
[307] Tupper, *supra* note 218 at 477.

focus on the potential for non-medicinal drugs (or medicinal drugs used in ways other than prescribed) to pose a risk for addiction. While it is understandable that healthcare services are designed to support people experiencing adverse effects from addiction-related disorders, the potential for substances to be used in ways that are controlled or beneficial are largely silenced. In these settings, addiction is conceptualized as a 'disease.' People viewed as having addictions[308] become "an object of anger, contempt or disgust, not only for violating the criminal law (in the case of illegal substance use), but for deliberately transgressing modern civil codes of order, rationality, and sobriety, and moral codes of cleanliness and purity."[309] Metaphorically constructing drugs as either a malevolent agent or a pathogen (leading to disease) frames persons who use drugs as "weak of will, untrustworthy, deluded, inauthentic and lacking volition."[310] Such addictions discourses serve to justify the installation of laws and policies that infringe on the personal autonomy of citizens.[311] Erroneously, the "the link between drugs, addiction and crime is now a 'social fact' in America. When drugs are viewed as 'inherently criminogenic', addicts are 'viewed as perpetually inclined towards criminality, making her or him a constant threat.'"[312]

Kate Seear interviewed lawyers in Canada and Australia to explore the concept of addiction in the courts. She found that framing personal drug use as an addiction aligns with a disability framework, which could be an effective legal strategy.[313] She explained, "the process of framing drug use as addiction is a means to an end: a way of ensuring access to basic health care rights and harm reduction services for people who use drugs, but who are not, by virtue of conservative political approaches to drugs, otherwise able to access them."[314] Beyond this, one Canadian lawyer stated, "It is strategic to frame many peoples' drug use [as addiction…] even if many people are not using drugs because of

[308] Note that terms like "addict" and "junkie" are considered pejorative and are experienced as discriminatory and stigmatizing. See e.g. Hannah D Shi, Sherry A McKee & Kelly P Cosgrove, "Why Language Matters in Alcohol Research: Reducing Stigma" (2022) 46:6 Alcoholism, Clinical & Experimental Res 1103.
[309] Tupper, *supra* note 218 at 482.
[310] Kate Seear, *Laws, Drugs and the Making of Addiction: Just Habits* (New York: Routledge, 2020) at 4.
[311] *Ibid*.
[312] Seear, *supra* note 310 at 72.
[313] Seear, *supra* note 310.
[314] *Ibid* at 73-74.

addiction.[315] An Australian lawyer shared a similar perspective, explaining, "so you say, 'Oh yes, drugs are bad', as well, like because you just have to. Even though underneath it all, I'm screaming and thinking this is actually a ridiculous concept."[316] In order to achieve optimal outcomes for clients, lawyers may reproduce problematized representations of drug use and addiction, thus perpetuating and entrenching biases within the legal system. Another Australian lawyer in this study spoke to this topic saying, "so in a plea in mitigation you're, it's often unfortunate, I guess, [you are] presenting your client in the –not the most helpless light possible –but you're playing up the challenges they're facing and all the things going wrong in their life, and how terrible it is for them and if they've got a disability, going on about their disability and so on. It's very – it's not a great model, and it's not great for clients"[317]

One societal challenge when confronting stigmatizing constructions of drug use and people who use drugs, as demonstrated in Seear's research, is that when people are using controlled substances in ways that are not posing harm (or is posing minimal harm), it is far less likely their use will come to the attention of medical or legal professionals. This generates significant societal misperceptions about the effects of drugs, as non-problematic use remains hidden and silenced. This results in the criminalization of members of society whose use is more public. Seear draws attention to this probability, stating:

> homeless people openly using illicit drugs in Downtown Eastside Vancouver are far more likely to be subjected to intensive policing and to be criminally sanctioned then wealthy Vancouverites who are able to consume drugs in the privacy of their own homes.[318]

In contrast, professionals are more likely to keep their use of substances private and within the context of their own homes.[319]

Representing drugs as inherently harmful, while overemphasizing individual reasonability and decontextualizing factors that contribute to the occurrence and severity

---

[315] *Ibid* at 73.
[316] *Ibid* at 74.
[317] *Ibid* at 150-151.
[318] *Ibid* at 154.
[319] Kiepek, *supra* note 300.

of harm, results in partial and inaccurate understandings. Such perspectives risk developing short-sighted approaches that neglect the need to address social disparities that often underlie the experience of negative consequences. Instead, there is a reliance on control, supply reduction, and demand reduction.

Tupper encourages us to "look beyond the taken-for-granted categories in our linguistic representations of the world, and to query whether and how things might be otherwise."[320] He asserts,

> this requires recognizing that the human proclivity to alter consciousness using psychoactive substances is an enduring cross-cultural and historical phenomenon, rather than a modern blight to be remedied through an interminable war against people who produce, trade, and consume drugs. At the same time, reflecting on the constitutive role of language and discourse in shaping public policy is an important step towards being more considerate, compassionate and inclusive in how we talk, think, and make political decisions about 'drugs' and psychoactive substances.[321]

In this section, it was my intention to provide a brief, evidence-informed, and nuanced overview about 'drugs' as a broad range of psychoactive substances that are variably regulated in Canada and globally. This provides important context when analyzing and interpreting the discursive construction of drug in sentencing decisions. In the next section, I introduce current discussions around evidence-informed regulation of drugs.

1.4.4 Evidence-Informed Regulation of Drugs

To begin this section, I provide a brief overview about the relationship between science and the law. I identify potential areas for misunderstanding to occur and discuss possible convergences. I then introduce contemporary discussions about the importance of evidence-informed drug law.

1.4.4.1 Science and the Law

[320] Tupper, *supra* note 218 at 463.
[321] *Ibid* at 483-484.

Law and science often seek to understand human conduct, experiences, and meanings in social contexts. This field of research is referred to as social sciences and the purpose of research can be to explore, describe, explain, evaluate, contribute to community action or change, or evoke, provoke, or unsettle.[322] Susan Haack asserts, "the legal system often gets less than the best out of science,"[323] related to factors such as the certainty (or lack thereof) with which empirical research can identify 'truths,' constraints in generalizing findings to individual cases, and a tendency in adversarial cases to seek extreme, often polarized, research findings.[324]

Empirical research involves observation or measurement of a phenomenon using a rigorous and systematic methodology. Methodologies are broadly classified as quantitative or qualitative, with decolonizing methodologies and Indigenous methodologies increasingly prominent. Quantitative research attempts to quantify aspects of lived experience, while qualitative research is generally considered to be more descriptive.

Natural tensions can arise between science and the law, depending on one's ontological view of the world and 'knowledge.' Law and science share common roots, having emerged historically in efforts to search for *truths* about existence, cosmology, and virtue. The belief that science can provide access to truth through observable and verifiable facts is referred to as *scientific realism*.[325] Scientific realism reflects the belief that:

> the theories of modern science paint an approximately true picture of unobservable reality, that scientific inquiry is capable of arriving at approximately true theories (even if it hasn't yet), and/or that the governing aim of scientific inquiry is to arrive at such theories (even if it never will).[326]

---

[322] Patricia Leavy, *Research Design: Quantitative, Qualitative, Mixed Methods, Arts-Based, and Community-Based Participatory Research Approaches* (New York: Guilford Press, 2017).
[323] Susan Haack, "Of Truth, in Science and Law" (2008) 73:3 Brooklyn Law Rev at 988.
[324] *Ibid.*
[325] In science, the term 'realism' philosophically aligns more closely with 'legal positivism,' as opposed to 'legal realism.'
[326] Curtis Forbes, "The Future of the Scientific Realism Debate: Contemporary Issues Concerning Scientific Realism" (2018) 9:1 Spont Gen 1.

There are many research paradigms, though I will discuss only positivism, post-positivism, and social constructionism, which have the most relevance for this thesis.[327] Within *positivism* and *post-positivism* paradigms[328], it is assumed that research can, at best, offer a probable approximation. Such approaches seek to identify norms and patterns but acknowledge that 'variation' is always present. Thus, even research undertaken in the most highly controlled laboratories cannot provide purely indisputable and uncontestable facts. Knowledge claims are subject to falsification, which is based on the assumption that it is impossible to prove a theory or phenomenon to be true using scientific methods, but it is possible *disprove* such claims. This epistemology became the more widely adopted approach to scientific inquiry in the 1900's and is still viewed by many as the more legitimate approach to empirical research than other methodologies that have since emerged.

Social constructionism is grounded in the perspective that "the ways in which we collectively think and communicate about the world affect the way that the world is."[329] Arising from social constructionism are questions about what is being constructed, who is involved, and what processes are implicated in the social construction of a phenomenon.[330] For instance, in Western society, the colour blue is generally considered masculine and the colour pink is considered feminine. Such gender difference extend to toys, clothes, jobs, and foods. Such difference arise from historical, cultural, and to some extent physiological differences. However, social constructionism approaches these types of social constructs as amenable to change when we talk, think, and act differently.[331]

---

[327] Other paradigm are defined and classified variably and may include: pragmatism, hermeneutics or interpretivism, critical, feminism, structuralism, post-structuralism, post-modernism, post-colonialism, post-post-modernism, new realism, and metamodernism.
[328] Kerry E Howell explains, "Positivists consider an external reality exists that can be understood completely whereas post-positivists argue that even though such a reality can be discerned it may only be understood probabilistically." Howell, Kerry, *An Introduction to the Philosophy of Methodology* (SAGE Publications Ltd, 2013); As defined by Yoon Park, under the goal of positivism, "Social and natural sciences should focus on discovery of laws that facilitate explanation and prediction." Positivist research can draw on qualitative of quantitative methods "generate explanatory associations or causal relationships." Yoon S Park, et al, "The Positivism Paradigm of Research" (2020) 95:5 Academic Med 690 at 690, 691.
[329] Dave Elder-Vass, *The Reality of Social Construction* (New York: Cambridge University Press, 2012) at 4.
[330] *Ibid*.
[331] *Ibid*.

There appears to be a common misunderstanding that social constructionist research is more prone to bias than positivist or post-positivist research.[332] However, even the most well-designed post-positivist research can be influenced, though often implicitly, by underlying values, beliefs, and assumptions. As noted, informed by the War on Drugs policies of the late 1900's, researchers predominantly sought to understand the potential adverse effects of illicit substances through quantitative measures of harm while neglecting beneficial or non-problematic effects. While the findings may have been accurate and legitimate, they were nevertheless partial. Bias can be embedded in the *research design* irrespective of ontology or methodology.

All methodologies have advantages and limitations. For instance, a limitation of quantitative research is that constructs are typically defined by researchers prior to data collection. Thus, to 'measure' an experience (i.e., aggression; well-being), criteria need to be identified to make such complex experiences measurable. A limitation of qualitative research is that it might involve a smaller number of research participants and thus more uncertainty exists with respect to how well the findings would reflect the broader population. In peer-reviewed publications, researchers are expected to explicitly document limitations that arise throughout the research design and process. This does not indicate flawed research; rather, it acknowledges the inherent limitations of research as a human endeavour.

The idea that science can offer truth to inform legal decisions appears to influence the degree to which science is viewed as a useful tool.[333] However, knowing that research aims for an approximation of the truth at best,[334] it is not a realistic expectation to assume scientists or other experts can confirm a singular fact or truth with 100 percent certainty. To further complicate matters, situations of interest to law largely occur outside the confines of controlled laboratories. Referring to Bruno Latour's work, it is described:

[332] David L Faigman, "Scientific Realism in Constitutional Law" (2008) 73:3 Brooklyn Law Rev 1067.
[333] Margaret A Berger and Lawrence M Solan, "The Uneasy Relationship between Science and Law" (2008) 73:3 Brooklyn Law Rev 847.
[334] Aligned with a post-positivist perspective.

> the artifacts of science do not possess the seemingly magical universal and cross-cultural utility that people ascribe to them. Instead, they only 'work' under certain very specific conditions that exist in the laboratories where they were produced.[335]

When a phenomenon is enacted outside a controlled laboratory environment, multiple, often unknown and unpredictable, confounding factors exist. In legal cases, experts may be asked to extrapolate how a phenomenon that is studied in a highly controlled environment would be enacted in a specific uncontrolled and largely unknowable context or in relation to a specific person. Although expectation that any scientist or expert could definitively claim certainty in the face of countless confounding factors is highly contestable.[336] Scientists and experts can nevertheless draw on existing knowledge and past experiences o draw credible conclusions or determine what is more or less probable.

Fallibility in the notion of searching for truth in law and legal theory has similarly been contested. In relation to processes that shape case law, Susan Haack asserts:

> a trial […] isn't exactly a "search for truth." Rather a trial is better described as a late stage of a whole process of determining a defendant's guilt or liability: the stage of which, under the legal guidance of the court, advocates for each side to present evidence in the light most favourable to their case […] Relevant evidence is thus sometimes excluded for reasons that have nothing to do with the truth.[337]

From this perspective, from a some within the legal system may demand something from science that it does not demand of itself – namely a process that insists on certainty and an ultimate search for truth.

It is an error to assume that certain approaches to science can be purely objective.[338] Science is not objective, regardless of how well variables are controlled in a laboratory environment. It has been asserted, "It is time to face the fact that we cannot know

---

[335] Paul Nadasky, "The Politics of Tek: Power and the "Integration" of Knowledge" (1999) 36:1/2 Arctic Anthro at 11.
[336] See Denis C Phillips & Nicholas C Burbules, *Postpositivism and Educational Research* (Lanham, Maryland: Rowman & Littlefield Publishers, 2000); Gert J J Biesta & Nicholas C Burbules, *Pragmatism and Educational Research* (Lanham, Maryland: Rowman and Littlefield, 2003); Michael A Peters & Nicholas C Burbules, *Poststructuralism and Educational Research* (Lanham, Maryland: Rowman and Littlefield, 2004).
[337] Haack, *supra* note 323 at 985-6.
[338] Haack, *supra* note 323 at 995.

whether we have got the objective Truth about the World (even if such a formulation is meaningful."[339] Jeffrey Foss, explains:

> There is more in the world (the Abundance of Nature) than can be captured in any representation, model, map, theory, mind, brain, or philosophy. Much must be left out. Leaving the right (i.e., the messy, murky, troublesome) stuff out is the first decision of any successful modeller. So the unexplainable always comes knocking for any theory, ideology, mapping, or representation—no matter how high-born or well-born or obvious.[340]

It is increasingly recognized that scientific inquiry is highly influenced by dominant theories and worldviews. For instance, standardised assessments of human behaviour are developed according to particular criteria and particular norms. Standardization of assessment has often drawn on populations of young, well-educated, middle-class, White, able-bodied, cis-gendered populations in the Global North – often university students who receive course credits for their involvement as participants. Research about the impact of illicit drug use provides another example of how even the most well-constructed research can nevertheless be non-objective. The United States War on Drugs had international impact on the scope of research undertaken during this time which was highly influenced by underlying political motives to frame illicit drug use as inherently harmful. Current research about some of these same drugs, such as cannabis and psychedelics, is more likely designed to explore enhancement properties and therapeutic potential, a possibility which was previously actively dissuaded, disregarded, and silenced. Objectivity, I would argue, is not realistic in any human endeavour. The best one can hope for is a practice of self-reflexivity where researchers critically reflect on not only their own beliefs and assumptions, but also institutional and societal factors that influence what is viewed as good and true and right, which is addressed in more detail in the discussion section.

Being unbiased or objective is not a required feature of all research methodologies. Researchers who engage in critical race scholarship, feminism, disability studies, decolonisation, and so on, are under no obligation to be neutral or to separate their own experiences and opinions from their research pursuits. Conducting research does not

[339] Hasok Chang, "Realism for Realistic People" (2018) 9:1 Spont Gen 31.
[340] Jeff Foss, "Feyerabendian Pragmatism" (2018) 9:1 Spont Gen at 28.

require one to become voiceless and disembodied, reinforcing and perpetuating unjust social practices. Instead, research can be aimed unapologically toward systemic transformation, liberation, and anti-oppression.

I can imagine that legal scholars might be frustrated with the imprecision and imperfection of empirical research. Pragmatically, law involves making decisive decisions to an extent that scientists do not face. There is not the same requirement for researchers to make enforceable decisions that directly impact an individual or populace. However, imperfection is also an expected and accepted feature of law. Chief Justice McLachlin stated:

> In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system.[341]

An intent in this section was to demonstrate that empirical research is not a tool that can be selectively wielded by legal professionals. Rather, science and law are intersecting processes of power and we must grapple with these as inherently imperfect human endeavours and learn to adopt processes to limit error. Where we cannot guarantee perfection, we must develop strategies to produce the best possible outcomes to the best of our abilities.

1.4.4.2 Evidence-Based Drug Law

The potential for evidence-based law is gaining prominence in the literature for decisions around migration,[342] emergency contraception and abortion,[343] corruption in public

[341] *Malmo-Levine, supra* note 86 at 577.
[342] Goranka Lalić Novak, Teo Giljević & Romea Manojlović Toman, "(Never)Mind the Evidence: Evidence-Based Law-Making in Croatian Regulation on Migration" (2021) 21:2 Croatia & Comparative Pub Admin 205.
[343] R J Cook, B M Dickens, & J N Erdman, "Emergency Contraception, Abortion and Evidence Based Law" (2006) 93:2 Intl J Gyn Ob 191.

administration,[344] family law reform,[345] offshore oil and gas infrastructure.[346] A prominent topic in criminal law is voluntary assisted dying,[347] where family members and medical professionals would – and have – otherwise faced murder charges. Other topics in criminal law that have relied on empirical research include, the admissibility of breathalyser tests,[348] causal links between advertisement bans and tobacco consumption,[349] supervised injection sites,[350] and the effectiveness of antiretroviral therapy as a safe-sex strategy.[351] In regard to drugs, empirical research is highly integrated into contemporary regulation of substances like pharmaceuticals, alcohol, cannabis, and tobacco. For instance, there is extensive research about the impact of taxation and marketing on purchasing behaviours,[352] which can be used to inform regulations that aim to mitigate harm.[353] Pharmaceuticals companies must demonstrate drug effectiveness and socially tolerable risk of harm.[354]

---

[344] Bryane Michael, Indira Carr & Donald Bowser, "Reducing Corruption in Public Administration through Evidence-Based Law: Using Data to Design Land and Implementation Ethics-Related Administrative Law" (2015) 12:2 Man J Intl Econ Law 167.
[345] Kay Cook & Kristin Natalier, "Gender and Evidence in Family Law Reform: A Case Study of Quantification and Anecdote in Framing and Legitimising the 'Problems' with Child Support in Australia" (2016) 24:2 Fem Legal Stud 147.
[346] John Chandler et al, "Engineering and Legal Considerations for Decommissioning of Offshore Oil and Gas Infrastructure in Australia" (2017) 131 Ocean Engin 338.
[347] Ben P White & Lindy Willmott, "Evidence-Based Law Making on Voluntary Assisted Dying" (2019) 44:4 Aust Health Rev 544; Jodi Lazare, "Judging the Social Sciences in Carter v Canada (AG)" (2016) 10:1 McGill JL & Health at S35 / (2016) 10: 1 RD & Santé McGill at S35.
[348] SCC Bulletin of 2 November 2012.
[349] SCC Bulletin of 29 September 1995.
[350] Hyshka, Elaine, Tania Bubela, & T Cameron Wild, "Prospects for Scaling-up Supervised Injection Facilities in Canada: The Role of Evidence in Legal and Political Decision-Making" (2013) 108:3 Addiction 468.
[351] *R v Mabior,* 2012 2 SCR 584, 2012 SCC 47, 2012 2 RCS 584, 2012 SCJ No 47, 2012 ACS no 47.
[352] Claire Wilkinson & Robin Room, "Warnings on Alcohol Containers and Advertisements: International Experience and Evidence on Effects" (2009) 28:4 Drug & Alcohol Rev 426; Ashleigh Guillaumier & Chris Paul, "Anti-Tobacco Mass Media and Socially Disadvantaged Groups: A Systematic and Methodological Review" (2012) 31:5 Drug & Alcohol 698; David (Rāwiri) Ratū, "Regulation Urgently Needed to Protect Māori from Alcohol Advertising" (2019) 1500 NZ Med J 132 106.
[353] *Assn of Canadian Distillers v Canadian Radio-Television and Telecommunications Commission (TD)*, 1995 2 FC 778, 1995 FCJ No 886; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 3 SCR 199, 1995 3 RCS 199 [*RJR-MacDonald*].
[354] Alexana Pacurariu et al, "Decision Making in Drug Safety-a Literature Review of Criteria Used to Prioritize Newly Detected Safety Issues." Pharmacoepidemiology and drug safety 26, no. 3 (2017): 327–334; Beatrice Brown et al, "Trends in the Quality of Evidence Supporting FDA Drug Approvals: Results from a Literature Review." Journal of health politics, policy and law 47, no. 6 (2022): 649–672.

Opportunities for evidence-informed criminal law was raised in *Find*, where Chief Justice McLachlin asserted, "More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome."[355] The shift towards evidence-based law has been influenced, in part, by the increased number of legal scholars engaged in empirical legal research.[356] This has expanded available research about the both substantive topics of law and knowledge about the impacts of laws and legal processes within society. The implicit and explicit ways that the legal system contributes to and perpetuates societal inequities is increasingly brought to the forefront of public attention through social media and substantiated through legal and non-legal research.

It has long been acknowledged there is a potential for harms to *arise from* laws. There remain a number of drugs criminalized under the *CDSA* and current research indicates harms associated with the laws which are disproportionate to any arguable inherent harms of the drugs themselves. In the 1969 Ouimet report, it was cautioned that laws should not result in "damage greater than they were designed to prevent."[357] Similarly, the 1976 Law Reform Commission, outlined considerations to determine whether conduct could convincingly be defined as a crime:

- "does the act seriously harm other people?
- does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
- … are we satisfied that criminal law can make a significant contribution in dealing with the problem?"[358]

---

[355] *R v Find,* 2001 1 SCR 863, 2001 SCC 32, 2001 1 RCS 863, 2001 SCJ No 34, 2001 ACS no 34, 2001 CanLII 32 [*Find*] at para 87; the matter of concern was "jury behaviour" and the degree to which jury members be impartial when adjudicating guilt or innocence in trials about sexual assault.
[356] Lee Epstein & Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford: Oxford University Press, 2014).
[357] Roger Ouimet, *Toward Unity: Criminal Justice and Corrections* (Ottawa: The Queen's Printer, 1969).
[358] Law Reform Commission. *Our Criminal Law*, 1976, as cited in Government of Canada. *The Criminal Law in Canadian Society*, 1982 online: <https://publications.gc.ca/collections/collection_2017/jus/J2-38-1982-eng.pdf> at 44.

The inclusion of diversion into the *CDSA* echos concerns around the reach of criminal law in Canada:

> Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other non-coercive, less formal, and more positive approaches is to be preferred whenever possible and appropriate. It is also necessary because, if the law if used indiscriminately to deal with a vast range of social problems of widely varying seriousness to the public, then the authority, credibility and legitimacy of the criminal law is eroded and deprecated. The lumping together of seriously harmful and wrongful conduct with a host of technical, minor, or controversial matters blunts the impact and undermines the effect the criminal law should have as society's institution of ultimate recourse. This lends to an analysis of harm that considers not only the 'conduct' but also the potentially harmful impact of criminal laws within society.[359]

As noted in Section 718 of the *Criminal Code* and section 10(1) of the *CDSA,* sentencing decisions relate to conduct which is unlawful and causes harm to others or the community. However, harms associated with drugs laws disproportionately impact some people more than others, such as "people who are poor and/or homeless, people with mental health and/or substance use issues, youth, children of parents imprisoned for drug crimes, Indigenous people, racialized groups, and women."[360] It is further argued that "many, if not most, of the negative outcomes that are associated with so-called recreational drug use and dissemination in society are either produced or made worse through prohibition."[361] The Canadian Drug Policy Coalition asserts,

> the continued emphasis on drug prohibition — from policing to prosecution to prisons — is failing to achieve both the stated public health and public safety goals of prohibition, and resulting in costly damage to the public purse, to public health and to human rights.[362]

Research shows that the criminalization of drugs has not reduced supply and has given rise to a number of undesired consequences, including limited access to harm reduction

---

[359] Government of Canada, "The Criminal Law in Canadian Society" (1982), online: <https://johnhoward.ca/wp-content/uploads/2016/12/1982-KE-8809-C7-1982-Chretien.pdf> at 42.
[360] Toronto Public Health, "Quick Facts: Harms Associated with Drug Laws" (April 2018), online: <https://www.toronto.ca/wp-content/uploads/2018/05/9888-Harms-Associated-with-Drug-Laws.pdf> [perma.cc/DA94-YDV7] at para 1.
[361] Brian D Earp, Jonathan Lewis & Carl L Hart, "Racial Justice Requires Ending the War on Drugs" (2021) 21:4 Am J Bioethics 4.
[362] Canadian Drug Policy Coalition, "Harm Reduction in Canada: What Governments Need to Do Now" online: <https://drugpolicy.ca/wp-content/uploads/2017/05/Harm-Reduction-in-Canada-EN.pdf> [perma.cc/FSP4-DYTL] at 2.

approaches which leads to increased transmission of blood-borne infections, lack of access to medicinal use of illicit substances, perpetuation of untaxed and unregulated financial markets, constrained experimental research, increased a market of adulterated drugs, and increased violence.[363]

The United Nations calls for more humane and effective "science-based and evidence-based policy decisions"[364] and advocates for nations "To promote alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use."[365] Existing laws, conventions, and policies are now recognized to be heavily influenced by antiquated and repressive populist politics.[366] The efficacy of drugs laws to protect the public from harm is not substantiated by contemporary empirical research.[367] Both in Canada and internationally, there is increased support for the decriminalization of drugs. Decriminalization has also received support by police in Canada, including the Canadian Association of Chiefs of Police (CACP),[368] the Nova Scotia Chiefs of Police Association,[369] and the Vancouver Police Department.[370]

Proponents of decriminalization draw on current research in their claims that classifying personal possession of specific drugs and paraphernalia as a crime does not deter people from using drugs, nor does it mitigate individual and societal harms.[371] When a not-

---

[363] Nutt 2020, *supra* note 231; Rolles, Stephen, "An Alternative to the War on Drugs" (2010) 341:7764 Brit Med J 127 [Rolles].
[364] United Nations Chief Executives Board for Coordination, "Summary of Deliberations. CEB/2018/2" (2019), online: <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf> [perma.cc/XX6S-S76F] [UN Summary of Deliberations] at 4.
[365] *Ibid* at 14.
[366] Rolles, *supra* note 363.
[367] Global Commission on Drug Policy, *supra* note 360.
[368] Special Purpose Committee on the Decriminalization of Illicit Drugs, "Decriminalization for Simple Possession of Illicit Drugs: Exploring Impacts on Public Safety & Policing" (July 2020), online: <https://www.cacp.ca/index.html?asst_id=2189> [perma.cc/G564-CLTU].
[369] Alex Cooke, "NS Police Chiefs Back Call to Decriminalize Possession of Small Amounts of Illegal Drugs" (14 July 2020), online: *CBC News* <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-police-chief-decriminalizing-drugs-1.5648297> [https://perma.cc/J3DS-US53].
[370] Peter Zimonjic, "Police Chiefs Call on Ottawa to Decriminalize Possession of Illicit Drugs for Personal Use" (9 July 2020), online: *CBC News* <https://www.cbc.ca/news/politics/chiefs-police-decriminalize-posession-personal-use-1.5643687> [perma.cc/M6R7-5T2C].
[371] Boyd, Susan C, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada.* (Winnipeg: Fernwood, 2016); Nutt 2020, *supra* note 231; Toronto Public Health 2018; Rolles, *supra* note 363.

insubstantial portion of the population uses illicit drugs – many engaging in commerce or sharing of said drugs – criminality becomes normalized, which weakens public respect for the law and can result in criminalization of otherwise law-abiding citizens. Furthermore, when severity of laws appear disproportionate to the types of experiences people have with using substances, they are less inclined to trust the legal system and more likely to break those laws. In *Malmo-Levine,* Justice Deschamps voiced an opinion that cannabis use can be understood as "socially neutral conduct"[372] that causes no harm and is not immoral; as such, when it is defined as a crime "Citizens become inclined not to take the criminal justice system seriously and lose confidence in the administration of justice" and "Judges become reluctant to impose the sanctions attached to such laws."[373]

In this introduction, I presented complexities inherent in the conceptualization of drug-related harm. Relative risk of harm from drugs is portrayed variably, based on conflicting stereotypes, personal values, legal status, and, sometimes, empirical research. I presented judicial decisions as a distinct discursive genre, where judges simultaneously communicate an outcome with direct impact on another person, convey information, and discursively construct ways of understanding certain conduct and people who engage in that conduct. In their positions of power and influence, judges are not only responsible for the impact of their sentence, but also for the indirect impact of what they say and how they say it in their judicial decisions.

In the next section, I describe the methodology and methods of my critical discourse analysis research aimed at exploring how judges have constructed harm in past judicial decisions.

[372] *Malmo-Levine, supra* note 86 at para 290.
[373] *Ibid.*

CHAPTER 2 METHODOLOGY

Matthew Mitchell argued, "Law is one of the most pervasive and powerful social institutions, and consequently, it is involved in producing, regulating, and affecting a panoply of phenomena ripe for social inquiry."[374] Formal legal texts are often overlooked sources of rich data in disciplines outside law, but have recently been recognized as "qualitative artefacts"[375] that can be effectively drawn upon to "interrogate both the possible meanings that a legal text might generate and the political investments and consequences that might follow from the dominant meanings associated with or arising from those texts."[376] Examples of legal discursive texts include Acts, Bills, transcripts of legislative debates, and national and international reports. In this study, I analyze judicial decisions, which is of particular value "due to their determinative status in the legal system."[377] Previously research of judicial decisions have included attention to:

> how legal texts constitute and transmit legal power, the role power plays in shaping legal interpretation, the interpretive techniques legal practitioners use to derive and contest the meaning of legal texts, the philosophical underpinnings of such modes of interpretation, the histories and cultures that shape legal interpretation, and the transposition of legal language into domains other than law.[378]

Non-doctrinal approaches to research about law offer opportunities to examine law as socially, culturally, politically, or and pragmatically situated; "It is concerned less with what the law is and more with what it does, how it works, and its effects."[379] The intent of qualitative research is not to discover a truth about law or the practice of law, but to "examine how reality is constructed through law, and to point out the contingency and contestability of those constructions"[380] This approach may be seen to align with critical legal theorists who proport that "legal doctrines can and do produce vastly different

---

[374] Mitchell, "Analyzing the law Qualitatively", *supra* note 19 at 102; Also see Roger W Shuy, "Discourse Analysis in the Legal Context" in Deborah Tannen, Heidi E Hamilton & Deborah Schiffrin, eds, *The Handbook of Discourse Analysis* (Oxford: Wiley Blackwell, 2018) 822.
[375] Meaning they are suitable subjects of study for qualitative research; Mitchell, "Analyzing the law Qualitatively", *supra* note 19 at 103.
[376] *Ibid* at 107.
[377] *Ibid.* In the Introduction, I explained that I will am analyzing discourse as a means of discursively constructing the concept of harm and it is outside the scope of this project to examine the performative nature of discourse.
[378] *Ibid* at 102.
[379] *Ibid* at 104.
[380] *Ibid* at 106.

interpretations depending upon the social and historical context in which they are interpreted as well as their interpreter's social and historical location"[381]

It is suggested that "reading legal texts qualitatively would require centring the value-laden and ideological dimensions of interpretation to consider, rather than excise, the cultural contingencies, power relations, dogmata, and histories that are bound up in them"[382] CDA is an ideal method for this approach to analysis, aligning with critical legal theory approaches that assume "there is no objective or neutral way to interpret the law."[383] In the next section, an overview of CDA will be presented, followed by an description of the methods used for this thesis.

2.1 CRITICAL DISCOURSE ANALYSIS

Both legal and social science scholars have observed that language "is the central medium through which law is created and expressed."[384] CDA is used to focus "on the ways discourse structures enact, confirm, legitimate, reproduce, or challenge relations of *power* and *dominance* in society."[385] Legal documents are a source of 'discourse.' When drawing on CDA, language is viewed less as a means to *portray* meaning, than to *create* meaning.[386] Fairclough asserts, "Discourses not only represent the world as it is (or rather is seen to be), they are also projective, imaginaries, representing possible worlds which are different from the actual world, and tied in to projects to change the world in particular directions."[387]

---

[381] *Ibid*.
[382] *Ibid* at 107.
[383] *Ibid*.
[384] *Ibid* at 102.
[385] Norman K Denzin, "The Cinematic Society and the Reflexive Interview" in J F Gubrium & J A Holstein, eds, Postmodern Interviewing (Thousand Oaks: SAGE Publications, 2003) 141.
[386] James Paul Gee, *An Introduction to Discourse Analysis: Theory and Method* (New York: Routledge, 2011) [Gee 2011a].
[387] Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003) at 87.

Hodgson, Hughes, and Lambert observe that "few words are actually value free."[388] For instance, a legal professional may refer to the subject of a criminal case by their name or as the accused, the defendant, a parent, a contributing member of society, a victim, a predator, a monster, or another term. While each word functions as a referent to a specific person, decisions about *which* to use constructs meanings beyond neutral identification. Meaning is created through factors such as word selection, word ordering, tone of voice, inclusion and exclusion of certain perspectives (or 'voices'), rules governing who can talk and when, and so on. Thus, even the most rigorous attempts to convey a particular standpoint neutrally will simultaneously create meanings.

How language is used is shaped by social actors and interactions. Law is an example of a field of practice that governs the use of language in specific ways, including a technical terminology and unique meanings attributed to certain words, highly structured formats for speaking and writing, specific citations practices, rules that govern who can talk and when in certain proceedings, and regulations around what type of discourse (e.g., evidence) is permitted, regulations around who is permitted (or not) to speak or have a voice in relation to certain decisions, and processes for evaluating trustworthiness and credibility of others. Beyond this, in law, there are certain contexts, such as written legislation and sentencing, where language has the power to govern ways of doing and being in society, with penalties for non-compliance.

Legal scholars have proposed discourse analysis as a suitable methodology in the examination of legal discourses, including judicial opinions and legal scholarship.[389] CDA of judicial decisions are specifically fruitful since "One of the key sites to investigate justice discourses are the courts. As a communicative enterprise, sentencing functions as an expression and confirmation of the norms and boundaries of a society."[390]

My approach to CDA of judicial decisions involves: i) an analysis of how a concept (in this case, 'harm') is represented in select texts, ii) identification of the sources that shape

[388] J Hodgson, E Hughes & C Lambert, "'SLANG' - Sensitive Language and the New Genetics - An Exploratory Study" (2005) 14:6 J Genetics Counselling 415 at 416.
[389] Karen Petroski, "Legal Fictions and the Limits of Legal Language" (2013) 9:4 Intl JL Context 485.
[390] Taylor, *supra* note 30 at 3.

the legal discourses, and iii) an analysis of the outcomes that arise from how harm is constructed in the texts.

One example of a CDA study that used judicial decisions as data examined how 'women who kill' are referred to by judges in sentencing remarks.[391] The researchers examined how women were discursively identified in sentencing remarks. They uncovered multiple identifiers, such as: she/her; forename + surname; title + surname; social role; appraisement (e.g., "monster"); functionalism (e.g., "killer," "defendant"); differentiation (e.g., "individual in decent society). They recommended that judges carefully consider the impact of using identifiers that degrade or dehumanize, even when accepting 'evidence' in their sentencing remarks.

A second example of CDA research that used sentencing remarks about cases pertaining to drugs as data. The researchers uncovered three types of discursive justifications for imprisonment, including "(a) the discourse of control, reinforcing the use of imprisonment for the management and punishment of problematic individuals; (b) the discourse of safety, presenting imprisonment as a necessary tool for the protection of the public; and (c) the discourse of duty, concerning judges' obligation to meet legislative requirements and community expectations."[392] It was concluded, "While drug use was mostly understood as a social problem requiring a more appropriate response than incapacitation, prison was nevertheless seen to be essential for the control of drug addicts, ranging from those who are to be pitied to those portrayed as apathetic to the harm they perpetrate."[393]

2.2 METHOD

[391] Amanda Potts and Siobhan Weare, "Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill" (2018) 31:1 Intl J Semiotics L 21.
[392] Taylor, *supra* note 30 at 5.
[393] Taylor, *supra* note 30 at 11.

The method for data selection aligns with scoping reviews, which offers a systematic approach to collecting and analyzing broad sources of data.[394]

Arksey and O'Malley outline five stages of a scoping review:[395]

Stage 1: Identify the research question; Researchers are expected to articulate a research question to inform data extraction (or data charting) and analysis.

Stage 2: Identify relevant sources of data; Researchers identify and specify data sources, such as databases, grey literature, hand searching, and so on.

Stage 3: Data source selection; Researchers articulate their rationale for including and excluding sources according to specified parameters.

Stage 4: Chart data; Researchers select specific types of data to be systematically extracted from all data sources and later analysed.

Stage 5: Collate, summarize and report results; Researchers summarize and interpret the data in order to answer the research question.

I describe each of these stages as they pertain to this study.

2.2.1 Research Question

The primary research question informing this thesis is: How is the concept of harm constituted in case law pertaining to the importation, production, possession, and trafficking of drugs in Canada? A specific focus of the analysis of harm is the extent to which judges accurately use empirical research to inform their decisions.

---

[394] Hilary Arksey & Lisa O'Malley, "Scoping Studies: Towards a Methodological Framework" (2005) 8:1 Intl J Soc Research Method 19 [Arksey]; Arksey and O'Malley discuss scoping reviews in relation to summarizing research data. I have drawn on the method as to inform a rigorous process, though the data source is court cases, not research literature. A common purpose for undertaking a scoping review is to summarize and disseminate information relevant to "policy makers, practitioners and consumers who might otherwise lack time or resources to undertake such work themselves," (at 21) which aligns with the purpose of this thesis. I am not aware of a scoping review process being used in case law specifically; however, an advantage to the method, as with integrative reviews is that it offers a suitable, defined process amenable to a broad range of data types from wide range of data sources, as demonstrated in Andrea C Tricco et al, "A Scoping Review on the Conduct and Reporting of Scoping Reviews" (2016) 16:15 BMC Med Research Method 15.

[395] Arksey*, supra* note 394 at 22.

2.2.2 Search Strategy

This study uses judicial decisions as the central data for analysis. Many, but not all, of the cases that met inclusion criteria involve *sentencing*, which is said to be:

> the culmination of the criminal process, and the moment at which justice is seen to be done. Inherent in the formulation of a sentence are value judgments about what constitutes harm, what behaviours need to be deterred, how vehemently conduct should be denounced and what an appropriate punishment is in the circumstances. As judges are located within public discourses as 'powerful, central figures, sitting in judgment on people and their lives' (Schulz 2008, 223), these value-laden assessments have pervasive effects.[396]

For my study, the sources of data were restricted to Canadian cases. In January 2023, I searched Westlaw, Lexis Nexis, and CanLII databases and the SCC website for Canadian cases related to the importation, possession, production, and/or trafficking of drug, where the concept of harm was discussed in relation to drugs. These databases appeared to offer a comprehensive range of judicial decisions.

An initial search of the keywords "harm" AND "drugs" in CanLII resulted in >36,609 cases. The keyword "substance" results in a plethora of unrelated cases, as it tends to refer to the "substance" of law, so this term proved ineffective. To narrow the search, I used the search terms ["harm principle" AND "drugs"] and ["harm to society" AND "drugs"] in the Westlaw, Lexis Nexis, and CanLII databases. This was too narrow for the SCC website, so only the search term "drugs" was used. Although these search terms do not capture *all* cases that pertain to drugs and harm, it is important to develop a strategy that is systematic, replicable, and feasible. The selection of keywords is an iterative process, whereby the researcher aims to precisely identify a set of data suitable to answer the research question, while containing the number of sources to a manageable amount for the scope of the project. As will be seen in the analysis, the keywords I selected appear to offer sufficient breadth of cases pertaining to types of drugs, types of charges,

[396] Frankie Sullivan, "Not Just Language: An Analysis of Discursive Constructions of Disability in Sentencing Remarks, (2017) 31:3 Continuum 411, at 413 [Sullivan].

level of court, jurisdiction, and so on, contributing to a rich, sufficiently representative, analysis.

In this study, it was my intent to examine the ways in which harm of drugs are discursively constructed in judicial decisions. To facilitate this, I do not limit the examination of drugs to those listed on the *CDSA*, but psychoactive substances more broadly. As evidenced in Appendix A in the Introduction, the classification of controlled substances is a social construct. The inclusion and exclusion of certain psychoactive substance is not directly related to prevalence of harm. There are two main reasons that I rely on the broader concept of psychoactive substances rather than current legal classification of 'controlled substances.' The first relates to the tenuous criminalized status of any particular drug, as prohibition of substances varies over time and across cultures. Although the criminalization of certain substances has been relatively consistent in Canada for over a century, there are marked exceptions, such as the brief period of alcohol prohibition in the early 1900s and the recent legalization of cannabis. The second reason is, as mentioned previously, the exclusion of certain drugs from criminal regulation *is* a matter of criminal law. Factors that lead to decisions to *exclude* drugs like alcohol and tobacco, which are associated with high degrees of relative individual and social harms (as presented in Appendix A), from contemporary Canadian criminal control is an intriguing matter for criminal law. Nevertheless, the search strategy that was implemented limits identification of drugs that are not included on the *CDSA* and a more comprehensive search would be required to remedy this limitation in the future. In Canadian law, alcohol is not considered a drug, so the search terms essentially functioned to exclude alcohol from this analysis. However, the search terms did uncover one case related to tobacco.

2.2.3 Case Selection

Following the database search, duplicate cases were removed. All remaining cases were screened for inclusion and removed if they did not directly relate to importation, possession, production, and/or trafficking of drugs, did not directly mention harm, or were published in French language only. Following the screening, the remaining cases were read in detail to determine whether the case suitably met the inclusion criteria. At this stage, cases were excluded if harm was not discussed directly in relation to importation, possession, production (also referred to as manufacturing), and/or trafficking of drugs. For instance, many cases cited Section 718 of the Criminal Code; namely "(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct." In these instances, the concept of harm was exclusively *mentioned as a principle of sentencing*, but not actually discussed in relation to drugs.

2.2.4 Data Extraction

Given the amount of data, Atlas.ti 23 software was used to facilitate data extraction. Initially, codes were identified deductively,[397] including demographics (age of the accused, name of judge and attorneys, age and sex of the accused, year of judgment, and type of charges); type of substance; and direct use of the terms "harm" and "harm to society." References to 'harm' could be direct, where the word 'harm' is explicitly used, or indirect, where indicators of harm are referred to but not named as a harm. During the early stages of analysis, a deductive approach to linguistic analysis was used. All judicial decisions were searched for words related to drugs (e.g., cocaine; cannabis) and harm (harm* to society; harm principle; death; children).

Of 170 cases assessed for eligibility (see Figure 2 in Section 3.1.1), 65 were initially reviewed for preliminarily analysis and briefly summarized. This allowed me to gain an

[397] As defined by Victoria Braun & Victoria Clarke, *Thematic Analysis: A Practical Guide* (London: SAGE Publications, 2022) [Braun], deductive analysis involves developing coding prior to analysis "informed by pre-exiting theory" (at 286), while inductive analysis "strives to be grounded in the data, rather than shaped by pre-existing explanatory or political theories; remaining inescapably shaped by the researcher's positioning and meta-theoretical assumptions" (at 289).

understanding about the types of cases, how harm is described, and how drugs and people who use or traffic in drugs are discursively represented and constructed. Certain cases were selected for initial review for specific reasons,[398] while others were randomly selected to ascertain the effectiveness of the data extraction process. This preliminary review allowed me to refine the data extraction tool and develop additional codes inductively. Additional terms were then used to identify reference to harm when the word was not explicitly used, such as 'overdose,' 'notorious,' 'danger*,' and 'destructive.' New codes were added to reflect the presence of language related to moralizing judgment, including: 'heinous,' 'pernicious,' 'scourge,' abhorrence,' 'reprehensible,' 'blight,' and 'greed.' Moralization language (or moralized language[399]) conveys moralizing judgement and refers to "the usage of language cues referencing moral values."[400] During the preliminary analysis using Atlas.ti, it became evident that few cases involved the same judge or attorney more than once, so this was removed from the final data extraction tool, as it would not be possible to make between-judge or between-lawyer comparisons.

Following the preliminary analysis, I revised the data extraction table. The resultant table included: name of case; sex and age of accused (when relevant and when provided); drug-related issue; sentence (or decision); types of drug-related harm; primary sentencing principles (or legal theories) considered; moralization language. I read each case in full and manually completed the data extraction tables. Reading each case in full allowed me to precisely and comprehensively identify and extract data, extending beyond the specific terms identified using Atlas.ti.

---

[398] Reasons included: cases prior to 2005 when mandatory minimums came into effect; cases related to substances other than cocaine; cases with high frequency of codes, where the topic of harm was subject to more fulsome discussion; cases with low frequency of codes to determine whether discussions of harm met the threshold for inclusion.

[399] Kirill Solovev & Nicolas Pröllochs, "Moralized Language Predicts Hate Speech on Social Media." (2023) 2:1 PNAS Nexus pgac281 at 1. These authors define moralized language as referring to "ideas, objects, or events construed in terms of the good of a unit larger than the individual (e.g., society)" and contributing to in-group and out-group motives.

[400] Musa Malik et al, "Does Regional Variation in Pathogen Prevalence Predict the Moralization of Language in COVID-19 News?" (2021) 40:5-6 J Language Soc Psy 653 at 656.

When reporting data in Tables 2 to 5 (located in the Appendix), I added markers (suprascripts) to indicate which extracted data was a) a citation from another case, b) reference to a secondary sources, and/or c) information provided by an expert.

It is important to note that I extracted data pertaining to the judicial decision and seemingly influential legal principles. These data serve as contextual information and are not the focus of analysis. In the future, a doctrinal approach to analysis is recommended to reliably analyze the extent to which legal principles impact how drugs and harm are constructed and the relationship to the presence of moralization language on decisions.

2.2.5 Data Analysis

Two approaches to data analysis were undertaken and findings are reported here. One approach involved descriptively summarizing demographic data, such as sex and ages of accused persons and the types of drugs. The other, more substantive approach, involved CDA. The centrality of discourse in law is described by Frankie Sullivan, who says "Law is language. That is, law, in action, consists almost entirely of linguistic events, and language is the primary way in which it is exercised, abused or challenged…. it is both the vehicle of the power of law and power itself"[401]

CDA is quite broad, so researchers need to make epistemological and methodological decisions. My methods are informed by CDA approaches that attend to power, politics, and ideology.[402] Teun A. van Dijk explains that it is important for analysis to "focus on those properties of discourse that are most typically associated with the expression, confirmation, reproduction, or challenge of the social power of the speaker(s) or writer(s) as members of dominant groups."[403] The types of decisions made by judges have profound implications for all members of the public. Regardless of whether a decision is

[401] Sullivan, *supra* note 396 at 412.
[402] For instance: Fairclough, Isabela & Norman Fairclough, *Political Discourse Analysis* (Abingdon: Routledge, 2012).; James Paul Gee, *How to Do Discourse Analysis: A Toolkit* (New York: Routledge, 2011) [Gee 2011b].; Teun A van Dijk, *Discourse and Power* (London: Palgrave Macmillan, 2008) [Van Dijk].
[403] Van Dijk, *supra* note 402 at 5.

made at the level of a Provincial Court or a Supreme Court, there are direct impacts, with lengthy and costly appeals the only option for alternative outcomes. Individuals accused of crimes are said to be "perhaps the less privileged actors within this [legal] network.[404] At higher level courts, judicial decisions influence how judges make future decisions, thus indirectly impacting society more broadly. CDA allows researchers to explore the implications that extend beyond the content of the case to examine how judges shape legal and social concepts through selective use of language. For instance, consider *Lacasse*, where Justice Wagner stated, "Rehabilitation is one of the fundamental moral values that distinguish Canadian society from of many other nations in the world, and it allows judges to impose sentences that are just and appropriate."[405] Justice Wagner positions the principle of rehabilitation as a central moral value. Beyond this, it is constructed as an international ideal and a source of national pride. The focus here is not on the crime, per se, but upholding what is just and right. As well, Justice Wagner is subtly advocating for judicial discretion; it is the responsibility of judges to uphold justice. Were he to simply state that rehabilitation is a sentencing principle that it must be considered, the conceptual meaning and the importance of the role of the judge to deliberate on ethical matters would be lost.

In this thesis, CDA methodologies are used to interpret data, with a focus on ideological representations of drugs and people facing drug related charges. This approach aligns with work undertaken by Kate Budd et al., who examined how moral panic[406] is constituted through discourse. They observed that particular practices or actors are constructed as problems through rhetorical strategies, "coupled with ideas purporting to

---

[404] Louise Victoria Johansen, "Between Standard, Silence and Exception: How Texts Construct Defendants as Persons in Danish Pre-Sentence Reports" (2018) 29:2 Discourse Soc 123 at 138.
[405] *Lacasse, supra* note 108 at para 4.
[406] Moral panic was defined by Cohen 1972 as occurring when "A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges, or deteriorates and becomes more visible," as cited in Sarah Tosh, "Drugs, Crime, and Aggravated Felony Deportations: Moral Panic Theory and the Legal Construction of the 'Criminal Alien.'" (2019) 27:2 Critical Criminology 329 at 330; also cited in James Windle & Paul Murphy "How a Moral Panic Influenced the World's First Blanket Ban on New Psychoactive Substances" (2022) 29:3 Drugs: Edu, Prevention & Policy 265 at 265.

be a 'solution' to that problem."[407] In their study about the payday loan industry, they found metaphorical language functioned to frame the issue as connected with pain, suffering, disease, and death. Through selective discursive decisions, agency was attributed to certain actors and moral responsibility thereby ascribed, serving certain political and ideological ends. This is an example of how CDA can be used to uncover how problematization of certain conduct and groups of people are shaped by language and influenced by ideology.

Stuart Hall discusses the ways in which ideologies produce social consciousness through language.[408] He explains that ideologies,

> work most effectively when we are not aware that how we formulate and construct a statement about the world is underpinned by ideological premises; when our formulations seem to be simply descriptive statements about how things are (must be), or of what we can 'take-for-granted'…. Ideologies tend to disappear from view into the taken-for-granted 'naturalised world of common sense.[409]

Stage 5 of Arksey and O'Malley's approach to scoping reviews is to summarize and interpret the data. CDA is one method used by researchers to analyze the ideologies embedded in text and talk, and ideal for this thesis. There are many methodological approaches to CDA. James Paul Gee describes 27 tools,[410] four of which were selected to inform this analysis.

---

[407] Kate Budd et al, "Metaphor, Morality and Legitimacy: A Critical Discourse Analysis of the Media Framing of the Payday Loan Industry" (2019) 26:6 Organization 802 at 805.
[408] Stuart Hall, "The Whites of Their Eyes" in Adam Jaworski & Nicholas Coupland, eds, The Discourse Reader (Abingdon: Routledge, 2010) 396 at 396.
[409] *Ibid* at 397. Cristian Staerklé, et al, observe that the term 'common sense' has taken on distinct meanings in contemporary times, "associated with 'ordinary people' whereas scientific thinking has become associated with despised elites. In other words, common sense has become a political weapon in itself against purported elite and scientific dominance." However, more generally, the notion of common sense arises from scientific skepticism and a belief that "firsthand experience might sometimes be the more trustworthy form of knowledge and considers common sense to be virtuous and legitimate because it rests on authentic and unmediated everyday experience." Cristian Staerklé, et al, "Common Sense as a Political Weapon: Populism, Science Skepticism, and Global Crisis-Solving Motivations" (2022) 43:5 Pol Psy 913 at 917; Another way of understanding common sense relates to 'practical intelligence' arising from the acquisition of knowledge and experience, as described by Sternberg et al. Robert J Sternberg, et al, "Testing Common Sense" (1995) 50:11 Am Psychologist 912; From this point of view, common knowledge encompasses factors such as procedural knowledge, critical thinking, problem-solving, experience, and expertise.
[410] Gee 2011b, *supra* note 402.

The first tool is the WHY THIS WAY AND NOT THAT WAY tool. Using this approach, researchers consider the various ways that grammar and language are used to convey information. Grammatical choices construct meaning and shape concepts. For instance, the following sentences convey similar information, but construct different meanings:

- The accused has regularly used substances.
- The accused has a diagnosed substance-related disorder.
- The accused is an addict.
- The accused is a long-term abuser/user of drug.
- The accused has struggled with drug use for several years.

The second statement conveys a medicalized perspective and conforms more closely to a disease model of addiction.[411] The third and fourth statements involve 'labelling,' which is understood in many disciplines to be stigmatizing and marginalizing.[412] The fifth statement presents a less stigmatizing description of 'drug use,' yet the term 'struggled with' can convey a sense of victimhood.

The second tool used here is the SIGNIFICANCE tool. Gee notes that significance is constructed through discourse. For instance, stating "the accused chose to traffic

---

[411] The term *medicalisation* describes a societal process in which "nonmedical problems become defined and treated as medical problems, mostly in terms of illness and disorders" as stated by Peter Conrad, *The Medicalization of Society* (Baltimore: The John Hopkins University Press, 2007) at 4; *See also* Thomas Szasz, *The Medicalization of Everyday Life* (Syracuse: Syracuse University Press, 2007); One criticism of medicalisation is that it "transforms aspects of everyday life into pathologies, narrowing the range of what is considered acceptable" Conrad at 7. With respect to substance use, the disease model of addiction is a medicalized model, which a hypothesizes a person to lose control, or volition, which is attributed to neurological changes resulting from exposure to a drug. The disease model is criticized for neglecting to consider social factors that influence substance use – for instance, see Jessica Storbjork, "One Model to Rule Them All? Governing Images in the Shadow of the Disease Model of Addiction" (2018) 37:6 Drug & Llcohol Rev 726; Craig Reinarman, "Addiction as Accomplishment: The Discursive Construction of Disease" (2005) 13:4 Addiction Research & Theory 307.

[412] Labelling theory relates to the discursive practice of attributing a person with a particular designation, typically related to something viewed as deviant from the social norm. Erich Goode elaborates,

> When labeling is institutionalized, it is coagulated into preexisting potential judgments, analogous to socioeconomic status or occupational prestige; anyone who is a member of the relevant society is likely to be subject to them. And institutionally, organizations possess the capacity to label and deal with individuals as deviants.

In Erich Goode, "Labelling Theory" in *Encyclopedia of Criminology and Criminal Justice* (New York: Springer New York, 2018) 2814 at 2814; Rebecca Gray describes some of the negative impacts of labelling people who use drugs, using terms like 'addict' and 'junkie' in Rebecca Gray, "Shame, Labeling and Stigma: Challenges to Counseling Clients in Alcohol and Other Drug Settings" (2010) 37:4 Contemp Drug Probs 685.

dangerous drugs" increases the significance of gravity of an offence as compared to "the accused pleaded guilty to trafficking cocaine." By including the words "chose to," the significance of moral culpability is enhanced; the adjective "dangerous" further portrays significance around the notion of harm.

The third tool is the CONNECTIONS tool. This tool can render connections visible or create a perception of a connection that may not be inherently evident. For instance, Greater Sudbury police Chief Paul Pederson, the incoming president of the Ontario Association of Chiefs of Police justified an increased drive to establish a "'a clear line' from purchase to the consumption of the drug and a cause of death that is directly related to [an] opioid" to hold people who sell fentanyl accountable for their actions that are viewed as contributing to the rising rates of drug toxicity deaths.[413] Such arguments can overshadow or silence other potential factors contributing to overdose, such as inadequate access to health and social services, poverty, and insufficient harm reduction options; thus rendering such connections invisible.

The fourth and final, tool is the INTERTEXTUALITY tool. The term intertextuality refers to instances when an author or speaker refers to or quotes ideas, representations, or meanings from another source. Analysis involves determining the ways in which the "internal dimension of the text is connected to its external context."[414] My goal is to uncover intertextual references to legal, secondary sources, and other sources that influence how harm is understood and presented within the texts. Certainly, judicial decisions are rich sources of intertextual data, with citations of previous cases, legislation, evidence, and so on. In legal research, the process of tracing the treatment of select cases is referred to as 'noting up.' In discourse analysis, intertextuality considers embedded 'voices' of others more broadly, seeking both direct citation and indirect or implicit reference. For instance, if a person refers to "working the steps," people with insider knowledge will recognize this as a reference to Alcoholics Anonymous and understand this means the person identifies as having an alcohol-related addictive

[413] Jane Sims, LFP LONGFORM: Police Target Drug Dealers as Fatal Opioid Overdoses Mount" (5 July 2019) online: *London Free Press* <https://lfpress.com/news/local-news/lfp-longform-police-target-drug-dealers-as-fatal-opioid-overdoses-mount>
[414] Kristeva, *supra* note 75 at 324.

disorders and is either working toward or maintaining abstinence. In Tables 2-5, I note when the judge: i) cited another case [indicated with superscript b (i.e., [b])]; ii) cited a secondary source [indicated with superscript c (i.e., [c])]; and iii) cited expert testimony [indicated with superscript d (i.e., [d])]. The intertextual analysis was structured to purposefully attend to the breadth and depth of empirical research integrated into decision making, contributing to knowledge around evidence-based law. The intertextual analysis attended to the ways in which multiple intertextual sources contributed to discursive constructions of drug harms, exploring how certain source were positioned as more or less credible and/or reliable.

Discourse analysis is very broad and can be used to explore the nature of discourse as socially situated (such as examining how legal discourse is unique compared to other genres), how social relationship are reified (such as discursive practices that establish hierarchies of power), how political values are conveyed, or how discourse is enacted verbally. The four tools (WHY THIS WAY AND NOT THAT WAY; SIGNIFICANCE; CONNECTIONS; INTERTEXTUALITY) were inductively selected after the cases selection process and after the data extraction process had begun to analyze specific aspects of the data occurring within a particular genre. While some tools may be equally appropriate for CDA,[415] it is not feasible or meaningful to fully and comprehensively analyze all possible meanings or constructions emerging from each tool.

Given the extensive amount of text for analysis, I did not undertake a clause-by-clause analysis. I read each case in full, but focussed my analysis on data specific to the research question: "How is the concept of harm constituted in case law pertaining to the importation, production, possession, and trafficking of drugs in Canada?" with a specific focus on the extent to which judges accurately used empirical research to inform their decisions.

[415] For instance, Gee describes other analytic approaches and tools, including practices, identities, relationships, politics, sign systems and knowledges, social languages, discourses, conversations, the fill in tool, the making strange tool, the frame tool, the doing and not just saying tool, building structures and meanings, the context is reflexive tool, situated meaning, figured worlds, and big 'D' Discourse; Gee 2011a, *supra* note 386; Gee 2011b, *supra* note 402.

2.2.5.1 Emergent Themes

Four themes emerged during the analysis for inclusion in this thesis. Thematic analysis is "a method for developing, analyzing and interpreting patterns across a qualitative dataset, with involves systematic processes of data coding to develop themes."[416] Identification of themes entails reflexive identification of patterns among coded data, decisions around what is included or excluded within a theme, determining adequacy of data to support or refute an interpretation, assessment of coherence of the data, and the degree to which a theme conveys novel or important within the broader knowledge base of a discipline.[417]

The first theme to be addressed is *Trafficking as Profit-Driven and/or Motivated by Greed* (Section 3.2.1). This theme emerged during the data extraction stage of analysis. I was struck by a perception that engaging in an activity (namely, drug production and trafficking) for profit was discursively constructed as socially undesirable, using words that would otherwise be interpreted as desirable were the means of earning profit through a legal enterprise.

The second theme relates directly to the research question and addresses *Constructions of Drugs and Harm* (Section 3.2.2). To inform the analysis, I reviewed the data extraction tables to examine how drugs were constructed in the cases. One of my stated research objectives was to specifically examine the extent to which judges use empirical research to inform their decisions. For feasibility, I narrowed my analysis to three substances, fentanyl, cannabis, and MDMA. I selected fentanyl due to the contemporary importance to the Canadian public and judiciary, which is marked in part by a dramatic increase in cases since 2019. In my observation, it is closely compared to other controlled substances, like cocaine, heroin, and methamphetamine in case law. In judicial decisions, judges often compare fentanyl to these other controlled substances and in the data extraction stage of the analysis, it appeared these drugs are discursively constructed in similar ways (however, this observation was not fully examined for this thesis). Cannabis offers a unique perspective in the analysis, as it was criminalized until 2018. This

[416] Braun, *supra* note 397 at 4.
[417] *Ibid* at 98.

provides an opportunity to examine how a controlled substance that was subsequently legalized was discursively constructed. I selected MDMA as a substance that continues to be criminalized, but like cannabis, is increasingly socially acceptable and an object of interest for its therapeutic potential. Thus, fentanyl, cannabis, and MDMA provide sufficient differences for analysis of the discursive construction of harm. In my observation, including an analysis of other controlled drugs would not add substantially novel data; however, excluding fentanyl would result in a thinner analysis, as the discursive construction of fentanyl appears to be far more complex than the construction of cocaine, methamphetamine, and heroin (again, this is a preliminary observation, outside the scope of this study for analysis, but nevertheless informed my decision about which drugs to explore in more depth in this section).

The third theme for analysis is *Seeking 'Neutrality' in Expert Testimony*. This finding emerged during the data extraction stage of analysis. As noted in the introduction, the admissibility of expert testimony has been articulated in case law; however, the discursive practices that shape an expert's contributions as trustworthy – based on neutrality – warrant further consideration.

The final theme, *Spaces for Nuanced Interpretation of Sentencing Principles*, likewise emerged during the data extraction stage of analysis. There were relatively few instances when judges discursively distanced themselves from a dominant opinion in case law. Although these instances were few and they related more to substantive case law than the discursive construction of drug-related harm, I included this as a theme to develop insight to the contemporary judicial context.

As noted above, the findings are not informed by a clause-by-clause analysis of all the data. Rather, select data from certain cases are drawn on as exemplars. Throughout the analysis, I explicitly indicate how the four discourse tools informed analysis.

CDA involves interpretation by the researcher, where the cited texts are not accepted as facts, but as functioning to (re)produce aspect of social life, such as identities, relationship, and power. This aligns well with judicial decisions, which have been presented in the introduction as normative evaluations and socially embedded discursive

practices. To promote a reflexive process, I made reflective notes and consulted with my supervisor, H. Archibald Kaiser, and thesis reader, Sheila Wildeman to examine my interpretations, assumptions, and emerging questions.

CHAPTER 3 FINDINGS

3.1 CASES

In this section, I provide details about the number of cases reviewed and reasons for inclusion and exclusion. This is followed by a descriptive summary of the included cases.

3.1.1 Cases Selection

Figure 2 outlines the selection process. The initial search yielded 628 cases following the removal of duplicates. Of these, 458 were removed based on a review of the case description, the decision, and in some instance a brief scan of the case itself (reasons provided in Figure 2). The remaining 170 cases were reviewed in full and 41 were removed (reasons provided in Figure 2). This resulted in a final 129 cases meeting the inclusion criteria. Cases were excluded if they *did not directly relate to drugs* (e.g., possession of firearms, prostitution, assault, murder, intoxication as a defence, sexual offences, impaired driving, extradition, pharmaceutical industry, immigration and citizenship, breaching probation, criminal procedure, personal substance use as a consideration related to charge, breach of probation, offences against rights of property, organized crime), if harm was not discussed in relation to drugs or drug laws (e.g., principles or objectives of sentencing; degree of defendant acknowledgement of harm), or if the case was published in French only. Typically, if a case was later heard at a higher Court, only the case for the higher Court decision was included. If the appeal related primarily to procedure and did not discuss the issue of substance use or harm, the earlier case was used. Adhering to well articulated inclusion and exclusion criteria improves the replicability of the search strategy. Naturally, this does not capture the full scope of the topic of interest. For example, many cases not included pertained specifically to simple drug possession or trafficking, but did *not* discuss harm in relation to drugs or drug laws. While the absence of discussion about harm could serve as an interesting comparator, it was outside the scope of this project and would negatively impact the feasibility. Limitations are further discussed in the discussion section of this thesis.

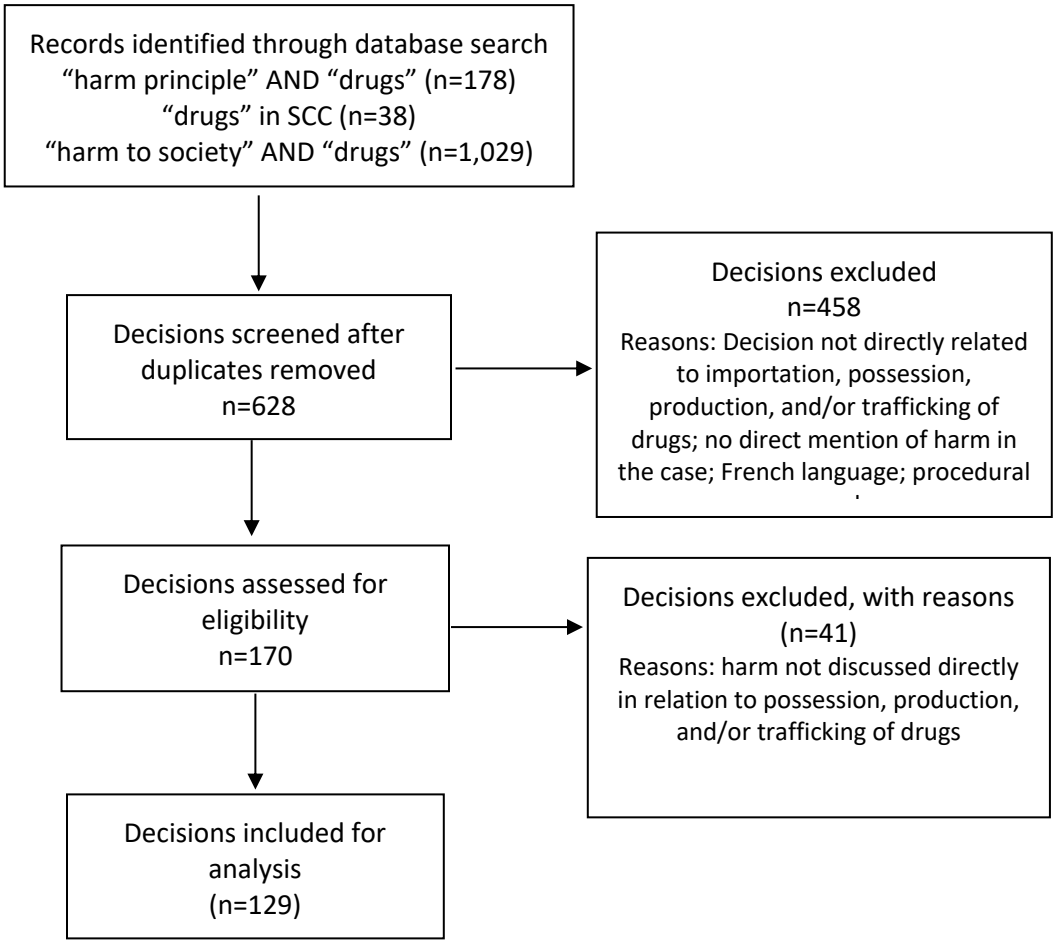

Figure 2: Data Selection Process

3.1.2 Overview of Written Decisions

The majority of decisions (n=125) related directly to sentencing for charges related to the importation, possession, production, and/or trafficking of drugs.[418] With the exception of n=2 decisions, all instances of charges for possession also included charges related to trafficking, production, and/or importation. Across all decisions, it was uncommon that the same judge heard more than one of the cases.

[418] Exceptions were: *Attorney General of Canada v. PHS Community Services Society*, 2011 SCC 44; *PHS v Canada (AG)*, *supra* note 253; *RJR-MacDonald, supra* note 353.

Extracted data is provided in Tables 2-5 in the Appendix.[419] Appendix B lists decisions that deal exclusively with cannabis. Appendix C lists decisions that relate to cocaine, methamphetamines, and opioids. Appendix D lists decisions related exclusively to other types of drugs, such as phencyclidine (PCP), khat, ketamine, N-Methyl-3, 4-methylenedioxy-amphetamine (MDMA), and tobacco. Appendix E includes two cases that relate to harm reduction services.

Only three decisions were written before 2001.[420] The earliest was written in 1981 and pertained to phencyclidine (PCP). In total, 158 people were identified subjects in these cases, as there was sometimes more than one accused addressed in a single decision. The majority of accused were men (n=138; 87%). Typically, when a woman was charged, a man was either co-accused or claimed to be involved in some way. For instance, in *Carswell*,[421] one man is said to have persuaded the mother of his child to bring him MDMA to the penitentiary where he was incarcerated; she was subsequently sentenced to 2 years incarceration for ultimately agreeing to this request. It was uncommon for the ethnicity of a defendant to be mentioned in the judicial decisions I analyzed. In some decisions, it was noted by the judge if a person identified as Indigenous, African Canadian, or if the person had immigrated to Canada, if the judge viewed this to have relevance for sentencing.

Nineteen written decisions which related exclusively to cannabis, from 1998 to 2021 (see Appendix B). These decisions most commonly related to production and trafficking. Several pertained to Charter challenges, claiming that the criminalization of cannabis for personal or medical use violated Section 7. Not all reported the age of the accused, either

[419] This table should not serve as a source of cases to be cited in legal arguments or sentencing. It is not a fulsome list of potentially relevant cases for judicial reference as only cases that met the research inclusion criteria are cited. Moreover, I have purposefully extracted troubling language (in addiction to non-troubling language) that I do not endorse reproducing in future decisions, with reasons discussed below.
[420] A possible reason for the low number of cases identified prior to 2001 could relate to the introduction the Section 718 of the Criminal Code in 1996. With this change, judges expected to "denounce unlawful conduct and the *harm* done to victims or to the community" [at (718a)], "promote a sense of responsibility in offenders, and acknowledgment of the *harm* done to victims or to the community" [at (718f)], and "provide reparations for *harm* done to victims or to the community" [at (718e)] [emphasis added]. It is possible that judges began to use the word "harm" more frequently in their judicial decisions as a result of its prominence in sentencing principles.
[421] *R v Carswell,* 2018 SJ No 73, 2018 SKQB 53, 409 CRR (2d) 205 [*Carswell*].

at the time of sentencing or the time of the alleged offences. Of those that did, ages at the time of sentencing ranged from 27- to 59-years-old with a mean age of 39-years-old.

Ninety-five decisions related to cocaine, methamphetamines, and/or opioids, from 2001 to January 2023. Of those which reported ages at the time of sentencing, ages ranged from 21- to 61-years-old with a mean age of 35-years-old. Some involved charges for more than one type of drug. Overall, the majority of charges related to cocaine (78%), followed by fentanyl or an analogue (e.g., carfentanil) (27%), other opioids (e.g., heroin, pharmaceuticals) (21%), and methamphetamine (19%). Among the included cases, the first decision that related to fentanyl occurred in 2015.[422] From 2015 to 2018, 20% of written involved fentanyl or an analogue; from 2019-2023, this increased to 53% of cases.

Eleven decisions related to other types of drugs, from 1981 to 2019. Of those which reported ages at the time of sentencing, ages ranged from 21- to 52-years-old with a mean age of 38-years-old.

3.2 CRITICAL DISCOURSE ANALYSIS

Judicial decisions varied broadly in style, which is not unexpected given the different levels of court, variability across judges, and historical period spanning 25 years. Some provided a great number of details about the events and activities leading up to charges (particularly when trafficking cases involved undercover officers) and others were highly contextualized, describing regional circumstances. In some written decisions, the judges spoke more *about* the accused, whereas in others they spoke directly *to* the accused, which was particularly evident when using the word "you." When speaking to the accused, the intent seemed to vary. Occasionally, the message appeared to convey the judge's perception of the severe gravity of the offence and the moral culpability of the accused, such as asserting the person is "among the very worst offenders in our society."[423] For example, in *Burke*, Justice Taylor clarified his position:

[422] *R v Feser*, 2015 AJ No 1376, 2015 ABQB 786 [*Feser*].
[423] *R v Burke,* 2008 PESCTD 11 (CanLII) [*Burke*] at para 22.

> My final consideration is mercy … Ms. Burke I say this: You are the one who harms your children. It was your decision to be a big time criminal drug pusher, put your children in physical danger in a drug trafficker home, and put them at risk of separation from their mother for the time you could be in prison. Now because of your criminal behaviour that risk has become real. I suspect your trafficking drugs, as suggested by the evidence of a drug enterprise, has already harmed many people, indeed ruined peoples' lives. Now you are responsible for three more victims, your own children.[424]

There are other instances where the message appeared to be one of inspiration, hope, and opportunity. In *Clunis,* Justice Odonnell made an attempt to teach and inspire:

> What if you were walking along the street and you came upon an elderly person who had fallen and hurt herself. Would you hit her? Would you steal her purse? I don't think you would. I don't think you would because you know it's wrong to take advantage of people who are weak, people who are vulnerable. But that is exactly what you do when you sell addictive drugs …. Ultimately, you have to decide if you want to be that kind of person. You have to decide if that is the kind of person your mother raised you to be. I know it is not.[425]

It this section, I present an analysis about how drug-related harms and trafficking are discussed, using the analytical tools of i) why this way and not that way; i) intertextuality; ii) significance; and iv) connections. There is high variability between decisions, so this analysis should not be interpreted to indicate standard or typical discursive practices. Some parts of the analysis summarize a select group of written decisions, whereas other parts bring attention to certain aspects common across a group of cases. For instance, one of the most striking features of the decisions was the extent to which drugs and people who traffic drugs were described using highly negative and moralization language, a feature that will be analyzed in this thesis. This is not to say that moralization language was present in *all* cases. To the contrary, of the 129 decisions included, 46 (36%) did not include this type of moralization language.[426] It is also worth mentioning that when moralization language was evident in relation to drugs in a specific case, it was not necessarily present throughout the entire case.

---

[424] *Ibid* at para 34.
[425] *Ibid* at para 16.
[426] Note that I only analyzed moralization language in relation to drug possession, cultivation, importation, and distribution. I did not extract data about moralization language that related to other factors, like addiction, possession of firearms, or involvement in organized crime.

The themes addressed in this analysis are: i) trafficking as profit-driven and/or motivated by greed; ii) discursive constructions of drugs and harm; iii) seeking 'neutrality' in expert testimony; and iv) spaces for nuanced interpretation of sentencing principles.

3.2.1 Trafficking as Profit-Driven and/or Motivated by Greed

Findings indicate that in 52 (41%) of the cases, conduct of the accused was described as profit-driven and/or motivated by greed. While the word 'greed' was frequently used, the notion of greed was also alluded to in other ways, such as:

- "selfish need to make quick money"[427]
- "He did not want to legally earn the money"[428]
- "profit from the misery" of others[429]
- "sole purpose [of commercial tobacco sales] is to promote the use of a product that is harmful and often fatal to the consumer by sophisticated advertising campaigns often specifically aimed at the young and most vulnerable"[430]

The SIGNIFICANCE of the discourse is to frame engagement in illegal conduct as involving personal volition and choice and to convey a deliberate intent to harm others. The third and fourth statements in particular construct a CONNECTION between profit and deliberate harm to others.

Throughout the decisions, the word 'greed' was often used rhetorically and without elaboration. Greed was commonly referred to as an aggravating factor when considered during sentencing. The SIGNIFICANCE is that the act earning an income in this context is viewed negatively, while producing a CONNECTION to the sentencing principle of gravity.

---

[427] *R v Roufosse*, 2001 NWTJ No 6, 2001 NWTTC 1 [*Roufosse*].
[428] *R v Malt*, 2016 BCJ No 2192, 2016 BCPC 322 at para 37.
[429] *White, supra* note 138; *R v Simmonds*, 2021 NSJ No 71, 2021 NSSC 54 [*Simmonds*]; *R c Cobb*, 2022 QJ No 7537, 2022 QCCQ 5171 [*Cobb*]; *R v Harmes*, BCJ No 723, 2022 BCSC 663 [*Harmes*]; *R v Kim*, 2022 BCSC 518 [*Kim*].
[430] *RJR-MacDonald, supra* note 353; Note, this case differs slightly from the others, as it relates to legitimate commercial sales. This case and *R v Murphy*, 2021 NJ No 8, 2021 NLCA 3, 398 CCC (3d) 354 [*Murphy*] (cannabis) are the only two cases included for analysis that involve a drug not classified as a controlled substance at the time the charges were laid.

The notion of greed also emerged though the use of language that could only be *interpreted* as conveying negative judgments within the broader context of the case. For instance, production and distribution processes were described as:

- A burgeoning business[431]
- A sophisticated operation for profit[432]
- "carefully and meticulously planned and carried out their project so as to obtain maximum production and immense personal gain"[433]
- Lucrative[434]
- "production requires planning, capital outlay and financial investment"[435]
- "A large amount of money stands to be made with minimal effort"[436]
- "commercial operation … a money-making mission"[437]
- Monetary personal gain[438]
- commercial enterprise[439]
- "purely mercantile motivation"[440]
- "lucrative, hard to detect, easy to operate enterprises"[441]

Semantically, these words and phrases do not inherently connotate negative value judgments. To the contrary – in capitalist societies, these terms tend to convey more favourable meanings. Discursively, moralizing meanings in the cases arises from the CONNECTIONS of the words in relation to drugs and other negatively value-laden words that leads the reader/listener to understand that these qualities are in some way

---

[431] *R v Lapointe*, 1998 BCJ No 2704 at 1 [*Lapointe*].
[432] *R v Shaw*, 2005 CCAN para 10,073, 2005 BCCA 380, 2005 BCJ No 1648, 214 BCAC 233, 199 CCC (3d) 93, 67 WCB (2d) 257, 2005 CarswellBC 1752 [*Shaw*]; *R v Berry*, 2011 OJ No 3551, 2011 ONSC 8016, 97 WCB (2d) 313, 2011 CarswellOnt 7708.
[433] *R v Agecoutay*, 2008 SJ No 326, 2008 SKQB 171, 316 SaskR 281 at para 50 [*Agecoutay*].
[434] *R v Cook*, 2010 ONSC 5016 at para 28 [*Cook*]; *R v Tran,* 2016 OJ No 2568, 2016 ONSC 3225 at para 31, citing *R v Nguyen*, 2017 BCJ No 1792, 2017 BCPC 261at para 170 [*Nguyen*]; *Nguyen* at para 170.
[435] *Nguyen, supra* note 434 at para 33.
[436] *Roufosse, supra* note 437 at para 5.
[437] *Ibid* at para 12.
[438] *R v Switucka,* 2009 SJ No 598, 2009 SKQB 372, 342 SaskR 316 at para 16.
[439] *R v Massey*, 2012 BCJ No 1465, 2012 BCSC 935, 2012 CarswellBC 2067 at para 21 and 59 [*Massey*]; *R v Beaven*, 2013 SJ No 180, 2013 SKQB 91, 415 SaskR 279 at para 17; *R v Khosravi*, 2019 BCJ No 601, 2019 BCSC 509 at para 24.
[440] *R v Rosales*, 2001 QJ No 919, JE 2001-866, 2001 CanLII 21315, REJB 2001-23312 at 8 [*Rosales*].
[441] *R v Sentes*, 2017 BCJ No 333, 2017 BCSC 290 at para 10 [*Sentes*].

undesirable. Within the context of these decisions, discourses of profitability, planning, and coordinated action function to lend weight (SIGNIFICANCE) to an assessment of the severe gravity of the offence.

In some instances, not participating in the legitimate workforce was portrayed as amoral and a threat to Canadian society. For instance, one judge opined:

> If a significant number of middle-aged, otherwise employable adults in British Columbia, or elsewhere in Canada for that matter, opted for engaging in activities that provided illegal incomes instead of legal and taxable ones, the quality of life in this province as we know it would substantially deteriorate[442]

The SIGNIFICANCE of an unsubstantiated statement like this is to distort a perception of harm, presenting the accused person as amoral and choosing lead one's life counter to public values.

People who traffic drugs were largely portrayed as having callous disregard for the health and wellbeing of others, while serving personal financial gain. People charged with trafficking were frequently described as "preying on" or "exploiting" members of society considered vulnerable.[443] In some sentencing remarks, people who traffic drugs were referred to as "merchants of misery,"[444] "merchant(s) of destruction and death,"[445] or "retailer(s) of poison."[446] One CONNECTION made through these and the statements that follow is to establish links between individual conduct and harm to others, despite there not being any identifiable victims:

- "preyed on the weak and the vulnerable with his toxic wares"[447]

---

[442] *R v Guilbride*, 2006 BCJ No 2047, 2006 BCCA 392, 230 BCAC 128, 211 CCC (3d) 465, 145 CRR (2d) 91, 71 WCB (2d) 220 at para 155, citing trial level decision at para 94 (trial level decision not available) [*Guilbride*].
[443] *Shaw, supra* note 432; *R v Rider*, 2013 MJ No 165, 2013 MBQB 116, 292 ManR (2d) 174 [*Rider*]; *Massey, supra* note 439; *R v Brown*, 2020 NLSC 103; *White, supra* note 138; *Parranto, supra* note 125; *Simmonds, supra* note 429; *Cobb, supra* note 429; *Harmes, supra* note 429 at para 41; *Kim, supra* note 429; Note: only *Brown* and *Parranto* directly suggest an interpretation of vulnerable, which refers to people with "addiction." *Parranto* also refers to vulnerable "remote" and "northern" communities, "where escaping traffickers is more difficult and resources for combating addiction are more sparse" (at para 71).
[444] *Harmes, supra* note 429.
[445] *R v Ursino and Dracea,* 2019 OJ No 1083, 2019 ONSC 1171 [*Ursino and Dracea],* at para 33, citing *R v Lawson*, 2003 OJ No 5040 ONSC at para 15.
[446] *R v Etmanskie*, 2019 NSJ No 548, 2019 NSPC 74 [*Etmanskie*]; *R v Morrison*, 2019 NSJ No 409, 2019 NSPC 38.
[447] *R v Richard Quast*, 2020 OJ No 5056, 2020 ONSC 6870 at para 42.

- "prepared to do significant damage to others so that they could make money"[448]
- "care little or not at all about the harm they are potentially seeding in the community"[449]
- "trafficking … is one of the most heinous of all crimes"[450]
- "committed by persons with no conscience"[451]
- "anyone who engages in the drug trade spreads misery"[452]
- "[the offender's] role in spreading this 'disease'"[453]
- "parasitic profit-making"[454]
- "Trafficking in fentanyl is almost the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette"[455]
- "front line of spreading those terrors and tragedies to others"[456]
- "preying on users' addiction and misery"[457]
- "spreading the misery of addiction"[458]
- "spread the plague of illicit hard drugs"[459]
- "pursuit of profit at the expense of violence, death, and the perpetuation of a public health crisis"[460]
- "customers' addictions as a 'road to riches'"[461]
- "willingness to exploit at-risk populations and communities"[462]
- "reckless disregard for human life" [463]

---

[448] *Cook, supra* note 434 at para 27, citing *R v Russo*, 1998 OJ No 4143 (CA) (QL) at para 14.
[449] *Roufosse, supra* note 437 at para 6.
[450] *Burke, supra* note 423 at para 16.
[451] *R v Grant*, 2007 MJ No 193, 2007 MBQB 135, 216 ManR (2d) 219 at para 6 [*Grant*].
[452] *R v Bacchus*, 2011 OJ No 5800, 2011 ONSC 7531 at para 22.
[453] *Massey, supra* note 439 at para 26; *R v Jordan*, 2014 BCJ No 2499, 2014 BCSC 1887, 2014 CarswellBC 2961 at para 26 [*Jordan*], citing *Johnson, supra* note 111 at para 29.
[454] *R v Alcantara*, 2017 AJ No 134, 2017 ABCA 56, 136 WCB (2d) 500, 47 Alta LR (6th) 71, 2017 CarswellAlta 215, 353 CCC (3d) 254 at para 89 [*Alcantara*].
[455] *R v Frazer*, 2017 AJ No 500, 2017 ABPC 116, 58 Alta. L.R. (6th) 185 at para 11 [*Frazer*].
[456] *Ibid* at para 51.
[457] *R c Nelson*, 2019 QJ No 4931, 2019 QCCQ 3534 at para 42 [*Nelson*].
[458] *R v Choi*, 2019 BCJ No 2398, 2019 BCPC 295 at para 40.
[459] *Ibid* at para 50.
[460] *Parranto, supra* note 125 at para 98.
[461] *Harmes, supra* note 429 at para 47, citing *R v Tam,* 1994 BCJ No 3097, 1994 CanLII 2181 (BCCA) at para 5].
[462] *Kim, supra* note 429 at para 28, citing *Parranto, supra* note 125 at para 70.
[463] *Ibid* at para 28.

- "personally "responsible for the gradual but inexorable degeneration of many of their fellow human beings"[464]

Using the WHY THIS WAY NOT THAT tool, we seek to understand what is produced by using language in particular ways. The quotes provided in this section function to construct the conduct as amoral, to convey opinions as rhetorical, taken-for-granted truths, to construct consumers as inherently vulnerable, to depersonalize the person accused (e.g., as having no conscience), and to magnify the perceived seriousness of the crime. When considering alternative ways to effectively and accurately communicate information about the person's conduct, there is certainly scope to provide specific details about the accused person and their conduct, without relying on generalized tropes. There are many assumptions made in cases like these that assume all Canadians share the same social capital and are able to secure stable employment in order to make a living wage, overlooking social stratification and poverty. There are also assumptions made that all people who purchase controlled substances are vulnerable and victims. This overlooks the vast number of Canadians who use drugs in ways that are controlled and potentially beneficial.

It was impossible to fully untangle data about trafficking from data about the presence of drugs in society. Trafficking was considered to be inherently connected with organized crime, violence, weapons, and risk to the "innocent" public.[465] Discursive CONNECTIONS linking conduct of trafficking (and associated harms) and the nature of drugs (and associated harms) created the images of willful defiance, intentional maleficence, and even "evil."[466] There was a lack of empirical evidence provided in the cases to support these claims and connections.

[464] *R v Mazerolle*, 2022 NBJ No 34, 2022 AN-B. no 342022 NBQB 38 [*Mazerolle*] at 42, citing *Smith* at 1053.
[465] See e.g., *R v Begon*, 2017 BCJ No 862, 2017 BCSC 757.
[466] *Grant, supra* note 515; *R v Krause*, 2015 BCJ No 3105, 2015 BCPC 305; *Etmanskie, supra* note 446; *R v Ursino and Dracea, supra* note 445; *White, supra* note 138; *Howard, supra* note 157.

One term that stood out was "scourge,"[467] which appeared in 26 cases. This term pertained to both drugs (e.g., MDMA, fentanyl) and trafficking. Drawing on the INTERTEXTUALITY tool, I sought an original source citation for the term "scourge" in relation to these decisions specifically.[468] A quick search for "scourge" on CanLII revealed 5 commentaries and 243 cases; of these, 90 cases included citation of *Smith*. In *Smith*, *Fyfe*[469] was cited to argue "perdition is precisely the correct term for the ultimate destination of purveyors and users of [Fentanyl]."[470] This demonstrates the degree to which *Smith* has influence on further deliberations. In *Smith*, "scourge" appears to relate to the high number of drug toxicity deaths and the high frequency with which fentanyl was involved. In many cases, the term '"scourge" appears to hold rhetorical meaning. Examination of the word scourge in past Canadian law relates to disparate matters such as "this increasing avalanche of divorces!"[471] antisemitism,[472] bank robberies,[473] and driving while under the influence of alcohol.[474] An early mention of scourge related to drugs arises in 1976, about heroin addiction.[475]

The use of words – such as scourge, plague, pernicious, and insidious – embody rhetorical meanings that rely on assumed shared meanings. In CDA, it is understood that words reflect meaning (such as morals) and values. As well, words have emotional associations that tend to be shared across people within social groups and cultures.[476] It is not unreasonable to assume that "scourge," in these cases, is meant to convey a moral judgment of undesirability and distain, unchecked permeation throughout society, and a

[467] While the word 'scourge' appears relatively frequently in legal scholarship, it tends to be used rhetorically and without definition. The word does not appear in the Lexis+ database dictionaries. According to the Merriam-Webster Dictionary, scourge is defined as "a cause of wide or great affliction" Merriam-Webster Dictionary "Scourge" online: <https://www.merriam-webster.com/dictionary/scourge> [perma.cc/R7QQ-4ZJH].
[468] Note: references to the word scourge on the SCC Cases database referring to impaired driving, sexual predation, disease (i.e., AIDS, measles), drug abuse and illicit trafficking, gun crime, anti-Semitism conduct, war, personal liability, with the earliest mention in 1877 referring to the Canadian Liberal party.
[469] *R v Fyfe* 2017 SKQB 5.
[470] *Smith, supra* note 137 at para 40.
[471] *Postar v Postar* 1941 OJ 124.
[472] *Drummond Wren* 1945 OR 778.
[473] *R v Lovis* 1972 BCJ 606, 1972 6 WWR 185.
[474] *R v Dawson* 1986 AJ No 236, 70 AR 12, 28 CCC (3d) 46, 16 WCB 201.
[475] *R v Laverick* 1976 BCJ 1146.
[476] Laura Alba-Juez & J Lachlan Mackenzie, "Emotion Processes in Discourse" in J Lachlan Mackenzie & Laura Alba-Juez, eds, *Emotion in Discourse* (Amsterdam: John Benjamins Publishing Company, 2019) 3.

phenomenon worthy of scorn. The word "scourge" is also reminiscent of pestilence and disease that requires response and cure. [477]

Moralization language infiltrates future cases, even if the source case was heard outside the appellant level or the SCC. This normalizes and validates the implicit intrusion of personal morals and values of judges in sentencing. Statements and knowledge claims that may not be substantiated by empirical research or which are inaccurate or incomplete can be perpetuated as truths.

Applying the IF NOT THIS THAN WHAT tool, one is encouraged to consider alternative ways of conveying the desired information. It has been explained that "metaphors express intense value judgements and may thus be expected to elicit significant value judgments from an audience."[478] Rhetorical meanings assume a shared understanding and allow the speaker to distance themselves from personal ownership of those meanings. Decter argued, "the challenge of writing is to convey what you mean, and avoid conveying what you do not mean."[479] Use of the word scourge, is a good example, as this is a metaphor that both expresses and elicits value judgments, while removing the responsibility of the speaker to precisely describe specific factors or to substantiate knowledge claims. This is particularly troubling when using rhetoric to heighten a perception of severity or gravity of an offence by eliciting emotional responses related to value judgements, rather than providing precise facts and reliable evidence. An alternative to using the scourge metaphor is to provide information about prevalence of use, incidence and description of harms, actual impact within society, and underlying societal factors that influence the degree of harm for specifical populations. Such practices are not new; in fact, they are modelled in many of the included decisions that contain little to no occurrence of moralization language or emotionally- and value-laden language. This is not to suggest that emotions and values do not have a place in law or legal decisions, but there is a risk

[477] The term 'epidemic' is viewed as having medicalized connotations that shifts the focus from systemic factors that create and perpetuate problematic experiences associated with substance use towards individualized approaches, as described by John J Frey, "An Epidemic, a Scourge, or a Plague" (2017) 116:2 WI Med J 55.
[478] Michael Osborn, Metaphor and Style (East Lansing: Michigan State University Press, 2018) at 63.
[479] A Decter, "Into the Darkness of Creation: An Editor's Journey" in Wendy E Waring, ed, *By, For & About: Feminist Cultural Politics* (Toronto: Women's Press, 1994) 115 at 118.

that neglecting to accurately and precisely describe specific factors and details can create and perpetuate stigma and render invisible broader social, legal, and political factors that influence individual conduct.

The use of moralization language, particularly through intertextual citations, appear intended to reinforce the SIGNIFICANCE of the severity of drug-related harms and to make CONNECTIONS between conduct and sentencing principles. Discursively, in doing so, moral standpoints and values enter decisions in ways that can artificially imply judge neutrality and that reduce any felt obligation around evidence or facts to accurately convey case-specific gravity.

Drawing on the WHY THIS AND NOT THAT analytical tool, I examine the conclusion offered by the trial judge in *Burke*:

> Traffickers of illegal addictive drugs are in my view among the very worst offenders in our society. They steal the lives of drug users, strip them of their humanity and turn their victims into mere shells of people with one great allconsuming need – to somehow buy and use more drugs. Addicts will do anything, commit any crime, to get their next fix, and so the harm is visited upon citizens in general, who are victims of embezzlement, theft, robbery, vandalism, break and enter, and assault or worse by drug users.
>
> As well, and this is particularly important in this case, drug dealers lead violent lives. People are killed in the illegal drug trade, dealers stealing from each other, fighting for territory, dealers assaulting and killing users, users assaulting dealers, and sometimes innocent people are caught in the crossfire. The weapons and dogs possessed by Ms. Burke are a stark reminder she was carrying on a dangerous activity in rural Covehead, PEI, an activity which endangered her neighbors, passers by, and especially her one year old and three year old children.[480]

This statement is replete with rhetorical, unsubstantiated knowledge claims and conveys more about the judge's personal perspectives, potentially influenced by prior knowledge about the community, than about the effects of drugs or the effects of trafficking. When considering what alternative information could have been shared (WHY NOT THAT), the judge may have structured his argument accordingly:

> Traffickers of illegal addictive drugs are in my view among the very worst offenders in our society.

[480] *Burke, supra* note 423 at para 22-23.

> *Describe where this charge fits within the Criminal Code the CDSA. [Accurately substantiate any claims that this crime is one of the worst; speak about the individual and avoid reifying stereotypes or asserting personal opinions about "traffickers" in general]*

They steal the lives of drug users, strip them of their humanity and turn their victims into mere shells of people with one great all consuming need – to somehow buy and use more drugs.

> *Explain that the disease model of addiction lends to an understanding that some people develop a dependence; drug-seeking is a feature of dependence.*

Addicts will do anything, commit any crime, to get their next fix, and so the harm is visited upon citizens in general, who are victims of embezzlement, theft, robbery, vandalism, break and enter, and assault or worse by drug users.

> *Many people with addictions are disenfranchised and impoverished, which is related to social disparities. In such contexts, some people will engage in other crimes to access the financial means to access drugs. [Citations of prevalence would strengthen this claim] [Potentially draw on disease model research about substance dependence and current 'recovery' rates in contemporary service systems].*

As well, and this is particularly important in this case, drug dealers lead violent lives. People are killed in the illegal drug trade, dealers stealing from each other, fighting for territory, dealers assaulting and killing users, users assaulting dealers, and sometimes innocent people are caught in the crossfire.

> *Given the criminalized nature of the distribution of controlled substances (use outside medical and pharmaceutical markets), people do not have legal rights or access to lawful remedies for non-payment of debts or assault. In this context of lucrative profits and a lack of access to legal resources, criminal associations arise. [Describe and cite data about frequency that citizens unaffiliated with drug trafficking may encounter personal harm]*

The weapons and dogs possessed by Ms. Burke are a stark reminder she was carrying on a dangerous activity in rural Covehead, PEI, an activity which endangered her neighbors, passers by, and especially her one year old and three year old children.

> *Ms. Burke increased the potential exposure of risks to her children and within her neighbourhood.*

The style and tone of the language in this case is not the norm, though it is also not unique. The judge in this case discursively constructs this "as one of the worst offences

involving the worst offender,"[481] without citing legal theory or empirical research to substantiate his declared "view."[482] The judge heightens the SIGNIFICANCE of the offences, thereby justifying the severity of the sentence. The SCC cautions against making such rhetorical connections, as stated in *Cheddesingh* "terms such as 'stark horror', 'worst offence' and 'worst offender' add nothing to the analysis and should be avoided."[483] Rather, relevant factors under the *Criminal Code* need to be considered on a case-by-case basis.[484]

The presence of unsubstantiated knowledge claims conveyed through rhetorical use of moralization language is not uncommon and will be discussed in section 3.2.3. The next section explores how drugs are discursively constructed in the included decisions, with a focus on cannabis, MDMA, and fentanyl.

3.2.2 Discursive Constructions of Drugs and Harm

In this section, I attend to the ways in which drugs are constituted as more or less harmful In the included decisions, judges tended to conflate harms associated with *drugs* and harms associated with *trafficking drugs*, which created frequent unwarranted CONNECTIONS between harms associated with drug and harms associated with trafficking, complicating the analysis. In all included decisions, the harm associated with drug possession, trafficking, production, or importation is described as indirect and lacking an identifiable victim. Fentanyl is relatively new to the Canadian market and there are currently a high number of toxicity deaths.[485] Whereas other drugs have a longer history of discursive construction, fentanyl offers a unique opportunity to examine an emergent legal construct. MDMA and cannabis offer interesting comparisons, as they have an extended record in Canadian drug law and both have undergone substantial changes in

[481] Citing *R v JAC,* 1995 CanLII 635 (ONCA) at para 141.
[482] *Burke, supra* note 423 at 22.
[483] *R v Cheddesingh*, 2004 1 SCR 433, 2004 SCC 16 at para 1.
[484] *Ibid.*
[485] "Opioid- and Stimulant-Related Harms", *supra* note 227.

public perception and greater availability of empirical research, with cannabis becoming legalized in 2018.

Of note, there is little measured discussion about the prevalence of beneficial or non-problematic use of the drugs in the cases, which would be informative when evaluating the degree of harmfulness. Similarly, there are few to no details about relative risk for harm; instead, all potential harms are listed as though they are equally likely and equally severe among all people who use the particular drug. Such representations exaggerate the CONNECTIONS between the drugs and the notion of harm, thereby increasing the SIGNIFICANCE of the accused's role in creating and perpetuating social harms.

As noted, it is not the intent of this analysis to evaluate the appropriateness of sentences or to determine the accuracy of each knowledge claim. The analysis is focused on the constructive nature of discourse, examining the ways in which judicial decisions convey certain values, morals, and theoretical perspectives.

3.2.2.1 Fentanyl

Included in this study were 26 decisions related to fentanyl, the first of which was in 2015. Between 2015-2018, 19 percent of the decisions listed in Appendix C involved fentanyl; between 2019-2022, 56 percent of the decisions involved fentanyl. Prior to this, the majority of decisions pertained to cocaine, crack cocaine, or methamphetamine.

As can be seen in Appendix C, *Frazer* is the first case among those included to explicate the harms of fentanyl and to espouse extensive moralization language. Justice Mason drew on data about harms from *Aujla,*[486] where Justice Van Harten cited evidence from the Alberta's Chief Toxicologist report. Justice Van Harten also drew on descriptions of harm described in *Feser.*[487]

[486] *R v Aujla,* 2016 AJ No 1248, 2016 ABPC 272.
[487] *Feser, supra* note 422.

In *Frazer*, Justice Mason used words like "death and destruction wrought by the scourge,"[488] "ripples of tragedy,"[489] and "insidious and insatiable monster."[490] He claims that "Trafficking in fentanyl is almost the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette."[491] The accused is said to have "joined the front line of spreading those terrors and tragedies to others."[492] As noted this use of language creates discursive CONNECTIONS to the conduct and potential victims, heightening the perceived gravity of the offence. The terms insidious and insatiable produce SIGNIFICANCE, conveying an urgency around the need stop this conduct, to denounce and deter, and to use incarceration as a means to protect the public.[493]

Although not cited, a search of the previous cases on Lexis Nexis reveals an earlier use of the analogy of Russian roulette by a Federal Crown Attorney in *Rowley*,[494] who stated:

> [Fentanyl is a drug, Your Honour, that is in patch form that people who suffer from diseases such as cancer are in the last stages of their life and put the patch on for extreme pain relief. Because it's in patch form you don't know where the drug is in the patch so when somebody takes a piece of the patch and ingests it, ie. smokes it, it's akin to somebody playing Russian Roulette because all of the deadly ingredients, if not used properly, could be in that one small part that they smoke and we've had deaths in this county as a result of that.[495]

In accordance with general sentencing principles, Justice Mason in *Frazer* appears to be making discursive CONNECTIONS to heighten a shared perception of a need for heavy sentences and Judge Allen *Sauve*, who declared "Fentanyl traffickers in Alberta can expect severe sentences."[496] He views deterrence as key principle, affirming it is the judge's duty to deter people from both using and trafficking in dangerous drugs.

---

[488] *Frazer, supra* note 455 at para 48.
[489] *Ibid.*
[490] *Ibid*.
[491] *Ibid* at para 11.
[492] *Ibid* at para 51.
[493] Such tropes become embedded in both legal and public discourse. For instance, in a newspaper article, fentanyl use was described as "adding bullets to a revolver before playing Russian roulette," McKinley Jr JC, "U.S. Authorities Step in to Charge 2 after Deaths from Extra-Lethal Heroin" (20 June 2014), *New York Times* at 20, as cited in Kennedy at 619.
[494] *R v Rowley*, 2014 OJ 2610.
[495] *Ibid* at para 132.
[496] *Frazer, supra* note 455 at para 30, citing *R v Sauve,* 2017 AJ No 195, 2017 ABPC 19, 48 Alta LR (6th) 388 at para 48.

A later case, *Friesen*[497] introduced a broader summary of potential harms, citing a report from the British Columbia Coroner Services, along with an alarmingly common portrayal of fentanyl. Justice Ker reified moralization language, such as the portrayal of fentanyl as a "notorious Grim Reaper stalking the streets of Canada's cities and towns."[498] Such language conveys evil, darkness, and death. While it is not my intent to minimize the importance of preventing avoidable deaths that are occurring, predominantly among marginalized populations in Canada, these representations are partial. Fentanyl is used medicinally for pain management and in such medical cases, the medication would offer relief. A problem with tropes is that as a figurative form of discourse they serve to convey partial understandings; when accepted, they reduce expectations for the speaker to share accurate and precise information.[499]

In *Friesen*, Justice Ker emphasizes the principles of recovery and rehabilitation, through discursive CONNECTIONS that create a perception of exceptionality by remarking on the accused's "miraculous transformation since his arrest."[500] Indeed, the judge decided the criteria for exceptional circumstances were met. In this case, fentanyl was portrayed as a harmful drug that posed greatest risk to marginalized populations, with Justice Ker noting the "most vulnerable members of our communities—the homeless, drug-addicted, and impoverished—are disproportionately represented in these grim statistics of death and addiction."[501] This case marks a shift in discourse, where the CONNECTION is between

---

[497] *R v Friesen*, 2019 BCJ No 1186, 2019 BCSC 1038 [*Friesen*].
[498] *R v Toth,* 2017 BCSC 501 at para 45. This portrayal has been further cited in at least two other cases. It was cited by Justice Kerr in the *Friesen, supra* note 497 decision at para 45. It was also cited by Justice Van Harten in *R v Aujila,* 2016 ABPC 272 at para 1.
[499] Foeglin asserted,

> We say that a central function of a whole series of tropes . . . is a mutually recognized intention by the speaker that the respondent not take the speaker's words at face value, but instead replace them with a correct judgment. In all these figures of speech, the speaker is trying to induce in the respondent a (mutually recognized) adjustment or replacement of what the speaker actually said

R Foeglin, *Figuratively Speaking* (New Haven: Yale University Press, 1986) at 87.
[500] *Ibid* at para 78.
[501] *Ibid* at para 42; Note, in drawing this conclusion the judge refers to information provided by the Crown (cited *R v Mann*, 2018 BCJ No 1237, 2018 BCCA 265 [*Mann*], which included evidence from Sgt. Eric Boechler of the RCMP and Dr. James R. Kennedy, Clinical Associate Professor of the Faculties of Medicine and Pharmaceutical Sciences at the University of British Columbia and St. Paul's Hospital), though none of the cited evidence referred to vulnerable populations; In other sections, the judge refers to a Public Health Agency of Canada news release entitled "Updated Numbers on Opioid-Related Overdose Deaths in Canada", a B.C. Coroner Service's November 14, 2018 report entitled "Fentanyl-Detected Illicit Drug Overdose Deaths: January 1, 2012 to August 31, 2018."

harm and fentanyl. The SIGNIFICANCE shifts from a villain-victim crime to a victimized-victim crime, which emphasis on the exceptional circumstances for this accused person.

In both *Frazer* and *Friesen*, the accused were acknowledged to experience addiction.

A more recent case about fentanyl is *Parranto*,[502] a SCC appeal of sentence from the ABCA pertaining to trafficking fentanyl at the wholesale commercial level. As can be seen in Appendix C, the description of harms is extensive and detailed. As of May 2023, it was cited 473 times. The SCC's judgment introduces a swath of moralization language that is later cited in numerous cases. A key principle addressed in this case was gravity. It was stated that "Appellate courts must sometimes set a new direction that reflects a contemporary understanding of the gravity of the offence"[503] and "The time has come for the perception of the gravity of largescale trafficking in fentanyl to accord with the gravity of the crisis it has caused."[504] Moldaver J. provided a concurring reason (and Côté J. concurred):

> Substantial sentences should be neither unusual nor reserved for exceptional circumstances, and maximum sentences should not be reserved for the abstract case of the worst crime committed in the worst circumstances. Sentencing judges should feel justified, where circumstances warrant, in applying mid-level double digit sentences and, in particularly aggravating circumstances, potential sentences of life imprisonment.[505]

As this case is related to large scale distribution, moralization language is directed more towards the person involved in trafficking than fentanyl itself. As a drug, fentanyl is said to be "public enemy number one."[506] However, the real threat to society, and the CONNECTION made, is said to arise from those who traffic. Citing *Smith*,[507] it is affirmed that those who oversee the distribution of these drugs are personally "responsible for the gradual but inexorable degeneration of many of their fellow human beings"[508] and

---

[502] *Parranto, supra* note 125.
[503] *Ibid* at 9.
[504] *Ibid* at 11.
[505] *Ibid* at 11.
[506] *Ibid* at para 93.
[507] *R v Smith (Edward Dewey)*, 1987 1 SCR 1045, 1987 1 RCS 1045, 1987 SCJ No 36, 1987 ACS no 36 at 2 [*Smith* 1987].
[508] *Parranto, supra* note 125 at para 88, citing *R v Smith*, 1987 1 SCR 1045 at p 1053.

trafficking is "the most efficient killer of drug users on the market today."[509] In this decision, the SCC declared that trafficking is "a crime marked by greed and the pursuit of profit at the expense of violence, death, and the perpetuation of a public health crisis previously unseen in Canadian society."[510] The SIGNIFICANCE pertains to individual responsibility, due to CONNECTIONS of direct harm, building an argument for a proportionally higher sentence.

Several cases, including *Parranto,* do acknowledge that fentanyl has therapeutic benefits. The risks associated with non-medical fentanyl are higher among naïve users and when surreptitiously added to other drugs.[511]

Framing fentanyl as public enemy number one and those who traffic it as principally responsible for the high rates of opioid toxicity deaths in Canada in contemporary times renders invisible the more complex societal factors that perpetuate the use of drugs, particularly among marginalized populations, and the failure of current social, health, and legal approaches to improve lives and mitigate risk.[512] In this way, the CONNECTIONS between inequitable systemic circumstances and the opioid crisis are rendered largely invisible. This is not to negate the harms associated with having an unregulated supply of a drug that is not subject to quality control and is added to other drugs without the knowledge of the person using it. It is also not my intention to suggest that people who traffic in drugs should not face penalties, nor is it my intent to critique the penalties given. However, when such moralization language is used and perpetuated through unreflexively citing previous cases, the significance of the particulars of the case at hand are lost.

When considering the WHY THIS WAY NOT THAT tool, it appears that the discursive construction of harm of fentanyl (re)produces discourses that perpetuate harsh criminalized responses to drugs. The discursive framing of fentanyl in these cases tends to frame culpability as purely individual, while neglecting to consider historical and

---

[509] *Ibid* at para 98, citing *Frazer, supra* note 455 at para 11.
[510] *Ibid*.
[511] *Ibid.*
[512] Liam Kennedy & Madelaine Coelho, "'Absolutely the Worst Drug I've Ever Seen': Risk, Governance, and the Construction of the Illicit Fentanyl 'Crisis'" (2020) 24:4 Theor Crim 612 [Kennedy].

contemporary government and systems level culpability that function to create and perpetuate social inequities that produce vulnerability. Such findings strengthen observations of "conservatism of the legal profession (i.e., their opposition to change) [as] a result of the Common Law tradition which looks backwards to past precedents for resolving problems of the present. However, it will be shown in section 3.2.2.3 that judges can and have acted in more activist roles, even if subtly.

3.2.2.2 MDMA

MDMA is reported to be among the most commonly seized controlled substances in Canada.[513] As reported in Appendix A, approximately 1.1% of Canadian adults report past-year use of MDMA.[514] Current research is underway to determine the effectiveness of MDMA-assisted psychotherapy for posttraumatic stress disorder, eating disorders, anxieties related to life-threatening illnesses, and neurodevelopmental disorders.[515] The majority of health risks associated with MDMA result from the presence of adulterants[516] and the majority of MDMA related deaths internationally have involved concurrent use of other controlled drugs.[517] In Canada, all MDMA-related deaths between 2017-2018 were attributed to the presence of an adulterant.[518] Long-term effects of MDMA are reported to be undistinguished from presence of adulterants.[519] Reported societal harms

---

[513] Canadian Centre on Substance Use and Addiction, "Cocaine" (2022), online: <https://www.ccsa.ca/sites/default/files/2022-10/CCSA-Canadian-Drug-Summary-Cocaine-2022-en.pdf> [CCSA "Cocaine"].
[514] Canadian Centre on Substance Use and Addiction, "3,4-Methylenedioxy-Methamphetamine (MDMA, Ecstasy or Molly)" (2022), online: <https://ccsa.ca/sites/default/files/2022-10/CCSA-MDMA-Ecstasy-Drug-Summary-2022-en.pdf> [perma.cc/7MF9-N3KJ] [CCSA "3,4-Methylenedioxy-Methamphetamine"].
[515] *Ibid.*
[516] *Ibid.*
[517] Roberta Noseda et al, "MDMA-Related Presentations to the Emergency Departments of the European Drug Emergencies Network Plus (Euro-DEN Plus) over the Four-Year Period 2014-2017" (2021) 59:2 Clin Toxicology 131; Amanda Roxburgh & Julia Lappin, "MDMA-Related Deaths in Australia 2000 to 2018" (2020) 76 Intl J Drug Policy 102630.
[518] Canadian Centre on Substance Use and Addiction, "Ecstasy or Molly (MDMA)" (2017), online: <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Canadian-Drug-Summary-MDMA-2017-en.pdf> [CCSA "Ecstasy or Molly (MDMA)"].
[519] CCSA "3,4-Methylenedioxy-Methamphetamine", *supra* note 514.

are high criminal justice costs arising from MDMA being classified under Schedule I of the *CDSA*.[520]

The judges in both *Carswell*,[521] and *Manhas*,[522] rely on the classification of MDMA as a Schedule I drug as confirmation of a CONNECTION to harmfulness. In *Carswell*, it is explained that this is "where Parliament has listed the most 'harmful drugs.'"[523] There is no mention in the *CDSA* confirming that the classification of drugs is predicated on current assessments of relative harm. However, as mentioned in 1.2.2.1, there exists no evidence in the *CDSA* that drugs are classified into Schedules based on severity of harm. As noted in the introduction, it is a longstanding critique internationally that legal classifications of drugs appear arbitrary and there is inadequate consideration of empirical research around harm.[524]

In *McArthur*,[525] Justice Challenger described MDMA as a harmful drug, stating,

> [The defence] point to the unsophisticated nature of his trafficking efforts and the nature of the drug itself, arguing - as some of the cases say - the mistaken belief that ecstasy is a recreational drug and less addictive or harmful than cocaine or heroin. I say that because to my understanding at least one person a week dies from the use of ecstasy in North America.[526]

This is factually incorrect, even when taking into account the potential for adulteration. In this situation, INTERTEXTUALITY is indeterminate, as Justice Challenger did not explicitly name a knowledge source; however, it is likely that public drug scare discourse influenced this belief. The CONNECTION made by Justice Challenger relates the perceived harms of MDMA to the sentencing principle of gravity. A review of empirical research reveals that in Canada, across 2016 and 2017, there were 9,414 deaths related to substance-related acute toxicity, including alcohol (34%), prescription drug (found at the

---

[520] *Ibid.*
[521] *Carswell*, *supra* note 421.
[522] *R v Manhas*, 2019 BCJ No 1462, 2019 BCSC 1293 [*Manhas*].
[523] *Carswell, supra* note 421 at Section 19.
[524] Nutt 2010, *supra* note 234 at 1558.
[525] *R v McArthur*, 2016 BCJ No 1520, 2016 BCPC 464 [*McArthur*].
[526] *Ibid* at section 13.

scene at least 41% of the time), and intentional overdose (13%).[527] Of these, there were 15 deaths attributed to any hallucinogen.[528] MDMA was not mentioned in this document. Similarly, in the United Kingdom, 3,744 deaths were reported to be related to 'drug misuse,' none of which were attributed to MDMA (or ecstasy).[529] The judge's decision was informed by an inaccurate estimation of harmfulness and no efforts were made to accurately confirm or dispute the lawyer's claim that ecstasy is less addictive or harmful than cocaine or heroin.

Rosales,[530] is an early case that cites Dr. Kalant.[531] Dr. Kalant's work was published 22 years ago, so we benefit from current research which indicates that MDMA is rarely toxic.[532] Early deaths were largely related to dehydration from high levels of exertion or, later, hyponatraemia due to excessive water intake by people who naïvely thought MDMA caused dehydration and subsequently increased their water consumption.[533] Absent from the citation of Dr. Kalant's publication in *Rosales* was the caution and uncertainty with which he represented his findings. For instance, when describing existing research about the effects of ecstasy, he wrote:

> A major limitation of these studies is that, even if they demonstrate decreased numbers of serotonin cells and reduced serotonin system function in the brains of MDMA users, *they cannot prove that the MDMA use caused the changes*. The alterations in serotonin function might have been present before the drug use began, they might even have contributed to the start of drug use or they might be purely coincidental.[534] [emphasis added]

---

[527] Government of Canada, "Substance-Related Acute Toxicity Deaths in Canada from 2016 to 2017: A Review of Coroner and Medical Examiner Files" (2023), online: <https://www.canada.ca/en/health-canada/services/opioids/data-surveillance-research/substance-related-acute-toxicity-deaths-canada-2016-2017-review-coroner-medical-examiner-files.html>

[528] These included 25I-NBOMe, 3-methoxyphencyclidine (3-Meo-PCP), ibogaine, lysergic acid diethylamide (LSD), mescaline, phencyclidine, psilocybin, unspecified hallucinogens.

[529] Office for National Statistics, "Deaths Related to Drug Poisoning in England and Wales: 2016 Registrations" (2017), online: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsrelatedtodrugpoisoninginenglandandwales/2016registrations> [perma.cc/H7TA-5AS8].

[530] *Rosales, supra* note 440.

[531] Harold Kalant, "The Pharmacology and Toxicology of 'Ecstasy' (MDMA) and Related Drugs" (2001) 165:7 Cndn Med Assoc J [Kalant] at 917.

[532] Nutt 2020, *supra* note 231.

[533] *Ibid.*

[534] Kalant, *supra* note 531 at 921.

Kalant concluded by saying "This review of the literature indicates that ecstasy (MDMA) and related drugs are *potentially* dangerous … Both the acute and the chronic effects can lead to serious and even fatal toxicity, *the full extent of which cannot yet be estimated with accuracy*" [emphasis added].[535] Given the available research at the time and the fact that Dr. Kalant presents ecstasy as "a derivative of methamphetamine (known by such street names as "speed," "crystal" and "meth" among others) and its parent compound amphetamine"[536] and argues that "one must conclude that the whole group of amphetamines and related drugs strongly resemble each other and cocaine"[537] it is not unreasonable that Justice Westmoreland-Traoré interpreted MDMA as a dangerous drug and framed SIGNIFICANCE around this INTERTEXTUAL information.

In 2022, Canada amended Subsection 56(1) of the *CDSA* to allow medical exemption for MDMA under certain circumstances.[538] Only six years earlier, the Crown in *McArthur* used the oft cited argument that people engaged in dial-a-dope for dealing cocaine and heroin are "'merchants of misery' who profit from the misery of others,"[539] without elaborating on her rationale for applying the same sentencing principles to MDMA. This trope is ill-suited for a reasoned argument about harms associated with selling MDMA specifically, yet rhetorically creates a CONNECTION between MDMA, cocaine, and heroin and creates a SIGNIFICANCE of implied harm to society.

3.2.2.3 Cannabis

Several written decisions included in my analysis involved Charter challenges arguing for the right to be able to access cannabis for medical and therapeutic benefits or as a personal choice. Among them, the notion of harm was discussed as early as 1998 in

[535] *Ibid* at 925.
[536] *Ibid* at 917.
[537] *Ibid* at 925.
[538] Brett Mulligan, "Canada Opens Access for Psilocybin and MDMA Therapy" (24 February 2022), online: <https://greenlightlawgroup.com/blog/canada-opens-access-for-psilocybin-and-mdma-therapy> [perma.cc/9SJH-ZAY7].
[539] *McArthur, supra* note 525 at 16.

Lapointe.[540] Justice de Villiers relies largely on his own observations in determining the potential for harm, asserting "As a youth court judge I read with monotonous regularity in predisposition reports relating to serious juvenile crimes that the young offender is a regular smoker of marihuana and does not concentrate on her or his school studies."[541] In this statement, the judge discursively constructs a CONNECTION between cannabis use and "not concentrating in school" as evidence of social harm, drawing on dominant, Western, capitialist concepts of morality. Ultimately, the guilty verdict was predicated on the fact that "Parliament has, in spite of all the agitation by certain vociferous and passionate advocates of marihuana use, decided that the cultivation of, trafficking in and possession of marihuana must all be punished as socially harmful."[542] This statement functions to diminish the SIGNIFICANCE of advocates while enhancing the SIGNIFICANCE of Parliament's power and authority. The arguments in this case are consistent with judges' rulings in the cases related to MDMA which presume inherent social harm due to the nature of legal classification.

The case of *Lucas*[543] followed *Parker*.[544] *Parker* was an appeal related to the cultivation of marijuana following the repeal of the *Narcotic Control Act*.[545] In *Parker*, a constitutional challenge involving Section 7 of Charter, it was determined that "deprivation by means of a criminal sanction of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person."[546] In *Parker*, Justice Rosenberg J.J.A. stated:

> I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marihuana in the *Controlled Drugs and Substances Act* to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the Charter, I would suspend the declaration of invalidity for a year. During this period, the marihuana law remains in full force and effect. Parker, however, cannot be deprived of his rights during this year and therefore he is entitled to a personal

[540] *Lapointe, supra* note 431.
[541] *Ibid* at para 29.
[542] *Ibid* at para 24.
[543] *R v Lucas,* 2002 BCJ No 1631, 2002 BCPC 268 [*Lucas*].
[544] *R v Parker,* 2000 OJ No 2787, 49 OR (3d) 481, 188 DLR (4th) 385, 135 OAC 1, 146 CCC (3d) 193, 37 CR (5th) 97, 75 CRR (2d) 233, 47 WCB (2d) 116, 2000 CanLII 5762 [*Parker*].
[545] *Narcotic Control Act*, RSC 1985, c N-1.
[546] *Parker, supra* note 544 at para 97.

> exemption from the possession offence under the *Controlled Drugs and Substances Act* for possessing marihuana for his medical needs.[547]

It was in this political and legal context that *Lucas* resulted in an absolute discharge. Mr. Lucas led an incorporated society called the Compassion Society. The society provided cannabis to members for medical use. It was stated that members had been approved for use of cannabis by physicians. Members signed a contract agreeing not to redistribute the supplies nor to use outside their homes. A breach of these rules would result in membership being revoked. According to Justice Higinbotham, there appeared to be tacit agreement with law enforcement to allow the society to function. Aligned with the Society Act, careful financial records were maintained. Mr. Lucas reported a break in and theft of cannabis and was subsequently charged with possession for the purpose of trafficking. Justice Higinbotham found:

> [although] Mr. Lucas offended against the law by providing marijuana to others, his actions were intended to ameliorate the suffering of others. His conduct did ameliorate the suffering of others. By this Court's analysis, Mr. Lucas enhanced other people's lives at minimal or no risk to society, although he did it outside any legal framework. He provided that which the Government was unable to provide - a safe and high quality supply of marijuana to those needing it for medicinal purposes. He did this openly, and with reasonable safeguards. … This court hopes that cooler heads will prevail pending the final resolution of issues regarding the medical and non-medical use of marijuana[548]

In this case, the use of language diminished the SIGNIFICANCE of the law by creating positive CONNECTIONS between cannabis and health, alongside negative CONNECTIONS between the government's efficacy to fulfil a responsibility and a citizen's right to health. Justice Higinbotham discursively distances himself from others – those whose opinions and decisions are apparently unreasoned and inflamed – and shields the accused from penalties of laws the judge considers unfair. While Justice Higinbotham does not elaborate on the potential harms (or lack thereof) associated with non-medical cannabis use, he does speak to medical use as beneficial. Analyzing INTERTEXTUALITY, the primary source of research evidence was cited from other cases and video comments of Allan Rock, a former Minister of Health and former Minister of Justice for Canada. Also

[547] *Ibid* at para 11.
[548] *Lucas, supra* note 543 at para 49.

included were testimonials from two people who used marijuana for therapeutic purposes.

Cases like *Parker* and *Lucas* appeared to create space for several *Charter* challenges over the next decade, where it was argued that access to cannabis for recreational use was a protected Charter right. These cases were not successful and were distinguished on the basis that the right to access cannabis for medical use differs from laws that prohibit access for recreational use. An underlying SIGNIFICANCE of the discourse used in these cases is that judges reify the medicalization of drugs. Drug are constructed as acceptable, and a right, when used medicinally, but not when used in controlled ways for pleasure or other non-medicalized ways.

Malmo-Levine[549] was a pivotal case that established cannabis as not entirely harmless. The Court asserted that "Avoidance of harm is a 'state interest,'"[550] but harm to others is not a *necessary* rationale for criminalization of conduct.[551] Although harms associated with cannabis use were reported to be low for the majority of people who use cannabis, it was recognized there were potential harms for some people, including: i) risk of injury to self or others when driving, flying and other activities involving complex machinery while under the influence; ii) higher risks associated with long-term "chronic" use; and iii) potential risk to specific groups identified as vulnerable to cannabis effects (i.e., adolescents with poor school performance; possible impact on fetus/newborns; persons with pre-existing conditions such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies). Although "conduct with little or no threat of harm is unlikely to qualify as a public health evil," the potential risk for harm in this case was not determined to be *de minimis*, or not "insignificant or trivial."[552] Although the Court upheld cannabis regulations to legitimately fall under the purview of Parliament, "The harm or risk of harm to society caused by the prohibited conduct must outweigh any

[549] *Malmo-Levine, supra* note 86.
[550] *Ibid* at para 131.
[551] *Ibid* at para 117, it is stated, "Several instances of crimes that do not cause harm to others are found in the *Criminal Code*, RSC 1985, c C-46. Cannibalism is an offence (s. 182) that does not harm another sentient being, but that is nevertheless prohibited on the basis of fundamental social and ethical considerations. Bestiality (s. 160) and cruelty to animals (s. 446) are examples of crimes that rest on their offensiveness to deeply held social values rather than on Mill's 'harm principle.'"
[552] *Ibid* at para 133.

harm that may result from enforcement."[553] Arbour J. dissented on Caine's appeal saying, "The harm associated with marihuana use does not justify the state's decision to use imprisonment as a sanction against the prohibition of its possession."[554] Finally, *Malmo-Levine* explicitly offers a broad interpretation of the role of Parliament to include the potential for decriminalization, declaring: "We conclude that it is within Parliament's legislative jurisdiction to criminalize the possession of marihuana should it choose to do so. Equally, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy."[555]

In *Malmo-Levine*, there was a concerted effort to understand the potential harms associated with cannabis. It was determined that

> It seems clear that the use of marihuana has less serious and permanent effects than was once claimed, but its psychoactive and health effects can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial.[556]

This definition of harm pertains specifically to individual effects, not potential risk of harm to others. Discursively, *Malmo-Levine* creates an intriguing set of CONNECTIONS that, at times, risks being contradictory. The written decision is highly INTERTEXTUAL, drawing on empirical research, past cases, legal theory, and expert testimony, to present a nuanced, evidence-informed understanding about the benefits and risks associated with cannabis. The connection to harm was minimal; however, it was accepted there was not an absence of harm. Similarly, there CONNECTION of harm and criminality was fluid – on one hand of interest, but at the same time not necessary. Research evidence was at once afforded SIGNIFICANCE in determining that risk for harm is not absent and INSIGNIFICANT, where Parliamentary decisions supersede research evidence.

One CONNECTION affirmed is that the government has the right to define the legal status of conduct; upholding legislation can be understood to align with *judicial conservatism*. However, there appeared to be some implicit *judicial advocacy* associated with the

[553] *Ibid* at para 249.
[554] *Ibid* at p 579.
[555] *Ibid* at para 5.
[556] *Ibid* at para 61.

statement "it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy."[557] Drawing on the IF NOT THIS THAN WHAT tool, it could be interpreted this statement was not necessary to answer the questions before the court. The judges could have concluded with a declaration that it is within Parliament's legislative jurisdiction to *criminalize* the possession of marihuana. The SIGNIFICANCE of proactively providing a decision about the option of *decriminalization* could be viewed as promoting the government to consider this option and preventing the need for a future case to be brought before the SCC to answer this question, thereby delaying reform.[558]

In several cases, the judges introduced nuance around the extent of harm associated with cannabis. Chief Justice Finch in *Guilbride* acknowledging a "past prevailing view" that cannabis and cannabis resin were "seriously harmful and addictive," while not espoused those views himself.[559] In *Murphy*, Justice Welsh acknowledged that "society's values towards cannabis had changed," while also acknowledging "the *Cannabis Act* does not suggest that cannabis is without inherent harm."[560]

MacFarlane, et al[561] reminds readers the "language" currently used to talk about "hard drugs" was previously used to convey perceived harms of cannabis. For instance, in *Forbes,*[562] a 1937 case related to the simple possession of a "small quantity" of cannabis, it was said:

> …the ever growing menace attending to this deadly drug to which so many young men and girls of High School age in the United States are becoming rapidly and in ever increasing numbers addicted…. it is as dangerous to youth as a rattlesnake.
>
> The Commissioner states that murders, suicides, robberies, criminal sexual assaults, hold ups, burglaries and deeds of maniacal insanity are yearly being caused by the use of this deadly narcotic drug[563]

---

[557] *Ibid* at 573.
[558] Evidence would be needed to ascertain whether this interpretation is accurate.
[559] *Guilbride, supra* note 442 at para 168.
[560] *Murphy*, *supra* note 430 at para 90.
[561] MacFarlane, *supra* note 126 at 1-6 2017-3.
[562] *R v Forbes* (1937) 69 CCC 140 (BV co Ct) at 140-144.
[563] *Ibid*.

This form historical example of inflammatory discourse, drawing on tropes of crisis, contributes to CONNECTIONS of harm and lends SIGNIFICANCE to rationales that favour severity in sentencing.

In *Lapointe,* Justice de Villiers acknowledged that although Parliament "has clearly taken into account the fact that marihuana is a much less harmful substance than the other drugs… it still regards marihuana harmful enough to warrant a penalty of up to seven years in the penitentiary for its mere production."[564] Justice de Villiers discursively distances himself from parliament's evaluation of cannabis as socially harmful:

> it is the function of us judges to give effect to the laws made by the elected representatives of the Canadian people in Parliament *whether or not those laws are in accordance with our own philosophy*. And in respect of marihuana Parliament has, in spite of all the agitation by certain vociferous and passionate advocates of marihuana use, decided that the cultivation of, trafficking in and possession of marihuana must all be punished as socially harmful. These activities remain criminal, and therefore it is futile for this offender to argue that what he is doing is not harmful and therefore deserving of leniency.[565] [emphasis added]

Using IF NOT THIS THEN WHAT tool, it appears the argument would be effective and complete without adding the clause "whether or not those laws are in accordance with our own philosophy," so we are led to question why this clause was included. Although Justice de Villiers does not explicitly state his opinion, he opens interpretation regarding whether or not he personally endorses the laws. In any case, his argument is consistent with scholars cited in the introduction who observe that a leading value for many judges is to uphold the law, irrespective of personal opinion.

There are some interesting distinctions in the legal treatment of cannabis and fentanyl. Cannabis was criminalized in Canada in 1923 and legalized in 2018.[566] Prior to

---

[564] *Lapointe, supra* note 431 at 9.

[565] *Ibid a*t 24.

[566] There is little known about the decision to criminalize drugs, as asserted in a 2002 Senate report:

> We were told that drugs were made criminal because they are dangerous. Analysis of debates in Parliament and in media accounts clearly shows how far this is from truth. When cannabis was introduced in the legislation on narcotics in 1923, there was no debate, no justification, in fact many members did not even know what cannabis was…we observed that:
>
> - Early drug legislation was largely based on a moral panic, racist sentiment and a notorious absence of debate.

legalization, constitutional challenges affirmed Canadians a right to access cannabis for medical purposes. Fentanyl, on the other hand, came onto the market as a controlled pharmaceutical substance. Early in what became known as the opioid epidemic, pharmaceutical companies were largely blamed for not accurately disclosing the dependence liability[567] of oxycodone and for overproduction, which contributed to both iatrogenic dependence[568] and recreational use.[569] Although both fentanyl and cannabis both have therapeutic uses, fentanyl is inherently more dangerous.

In each of these examples of cannabis, MDMA, and fentanyl, judges appeared committed to uphold the laws, apparently regardless of personal values or social consensus (or advocacy) to the contrary. At the same time, there are examples when judges discursively distance themselves from the law and when judges advocate, even if subtly, for reform.[570]

3.2.2.4 Constructing Gravity of Offence in Relation to Perceived Harmfulness of Drugs

Discussions around harm typically arose in relation to defining the gravity of the offence, denouncing specific conduct pertaining to specific drugs, proposing a rationale for the importance of deterrence from the conduct, and expounding on the relative harm of the

---

Senate Special Committee on Illegal Drugs "Cannabis, Our Position for a Canadian Public Policy: Summary Report" (September 2002), online: <https://sencanada.ca/content/sen/committee/371/ille/rep/summary-e.pdf> [perma.cc/PS7D-9E6J] at 22.

[567] Dependence liability refers to the propensity for a drug to produce psychological and physical dependence. Dependence liability depends on three key substance properties; the pharmacological effects of the substance, the route of administration, and the amount of the substance used, as described by Bruna Brands, Beth Sproule & Joan Marshman, *Drugs and Drug Abuse,* 3rd ed, (Toronto: Addiction Research Foundation, 1998).

[568] Iatrogenic dependence arises from continued use of prescribed pharmaceuticals (such as opioids) that result in pharmacological tolerance and the experience of withdrawal symptoms when use is reduced or discontinued.

[569] Marie A Chisholm-Burns, "The Opioid Crisis: Origins, Trends, Policies, and the Roles of Pharmacists" (2019) 76:7 Am J Health-System Pharm 424.; Napoli, Paul J & Hunter J. Shkolnik, "Jury Concludes Pharmaceutical Companies Fueled Opioid Crisis in NY" (New York: Business Wire, 2021).

[570] This appears to be presented as interpretations of legal principles. For example, in *Malmo-Levine, supra* note 86, Judge Arbour is cited as saying in *Caine* (at 258), "it is unconstitutional for the state to attempt to prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it."

conduct. Although there are a wide range of considerations in sentencing, such as whether the person was in possession of weapons, I focus here on gravity in relation to the perceived harmfulness of drugs.

An examination of the construction of harm across fentanyl, MDMA, and cannabis shows that the perceived harm of drugs is highly contextualized in time and place. Increasingly, discursive CONNECTIONS are made between the concept of harm and the adverse effects of criminal law; the result in such instances is a reduction in the SIGNIFICANCE of harms attributed to drugs themselves. Some judges recognize that penalties may disproportionately cause more harm for some people, than the harms associated with the drug itself. This shift is also evident in relation to fentanyl, particularly in cases where the accused person is identified as having an addiction.[571]

In many decisions, judges grappled with determining the relative harmfulness of drugs. The starting point for consideration of the length of sentence, prior to consideration of aggravating and mitigating factors, was an assessment of the degree of harmfulness attributed to the drug. It was generally accepted that heroin, cocaine, and methamphetamine were similar in terms of harmfulness.[572] Crack cocaine was considered to be more harmful, followed by fentanyl, and then carfentanil.[573] The SIGNIFICANCE tool is useful in understanding the ways in which assertions of harm are wielded to substantiate decisions around 'gravity' of offence and the compelling need for sentences that endorse denunciation and deterrence. In many instances, the relative harms of drugs are discussed; the more harmful the drug in relation to other controlled substances, the more worthy of a longer sentence of incarceration.

Gravity of the offence,[574] as related to relative harmfulness, was often discussed in CONNECTION to the principles of moral culpability or moral blameworthiness. When the

[571] See e.g., *Aeichele, supra* note 157; *Ellis 2022, supra* note 44; *Howard, supra* note 150.
[572] See e.g., *Grant, supra* note 451 and *R v Gilker*, 2022 NBJ No 346, 2022 NBKB 247.
[573] See e.g., *R v Deflorimonte*, 2005 OJ 6182; *Cormier v R*, 2018 NBCA 38 [*Cormier*]; *R v Gill*, 2021 BCPC 351 [*Gill*]; *Parranto*, *supra* note 125.
[574] The majority of the cases refer to gravity as a principle to consider in relation to proportionality, without defining gravity. *Alcantara, supra* note 454 refers to *R v Arcand v Arcand,* 2010 ABCA 363, 499 AR 1 (at para 57) as asserting, "gravity of the offence is directed to what the offender did wrong. It includes two

term *moral culpability* was addressed in some detail, higher level of blame was often inferred and responsibility placed on accused for their 'decisions.' Language tended to be accusatory and shaming, offered as justification for higher sentences based on principles of punishment, deterrence, and denunciation. Some judges used information about high overdose rates as rationale for moral culpability, claiming that individuals who were charged with selling fentanyl, even when unknowingly, were inevitably contributing to social harms. It was assumed, in some cases, likely that people will have been harmed from using the substances sold by a specific person. For example, Justice Ritchie in *Gill* said,

> We, of course, can never know if the drugs you sold would have killed anybody. As far as we are aware, the drugs you sold and had in your possession were confiscated by the police; however, it is no doubt in my mind that the amount of drugs you had, in most likelihood would have caused harm to members of our society.[575]

Though not a focus of this study, I observed that substance use – namely addiction – was considered as a mitigating factor in cases related to trafficking. The absence of a reported addiction or personal use of substances appeared to lend to the SIGNIFICANCE of an interpretation that the defendant was morally corrupt, rather than trafficking resulting from presumed uncontrollable impulses arising from addiction.

When the term *moral blameworthiness* was used, language tended to be more compassionate and judges tended to emphasize prospects for rehabilitation; the SIGNIFICANCE of an interpretation that the defendant was morally corrupt was diminished.[576] This is not to say that judges did not acknowledge harms associated with drugs, particularly in relation to the high rates of toxicity deaths related to illicit fentanyl, but it was noted that no single person could be held accountable for the high death rate.[577] Incarceration and lengthy sentences were viewed as a potential harm and they could disrupt efforts toward rehabilitation.[578]

---

components: (1) the harm or likely harm to the victim; and (2) the harm or likely harm to society and its values" at 89.

[575] *Gill, supra* note 573 at 5.

[576] See e.g., *Ellis 2022, supra* note 44; *Manhas, supra* note 522; *R v Sidhu*, 2008 OJ 3479 [*Sidhu*]; *Nelson, supra* note 457; *R v Campbell*, 2021 BCJ No 971, 2021 BCSC 853 [*Campbell*]; *Howard, supra* note 157.

[577] See e.g., *Campbell, supra* note 576.

[578] See e.g., *Sentes, supra* note 441; *Shallow, supra* note 111.

3.2.3 Seeking 'Neutrality' in Expert Testimony

As described in the introduction, there are principles that inform who is qualified to provide expert testimony and the type of information that can be shared to inform the judicial decision. In this section, I examine some of the ways that judges draw on, interpret, and use expert testimony. The primary focus of this analysis is *how judges discursively construct* the expert and/or information as more or less reliable. This is not an analysis of the appropriate use of experts; nor is it my attention to prove or disprove the evidence provided by any of the expert. Rather, I aim to explore how judges might endorse some perspectives and silence others, without necessarily evaluating the trustworthiness of the research itself.

Essentially, all included expert testimony is an instance of INTERTEXTUALITY; the judge selects some information to cite and deliberately comments on that information when articulating their decision. Information about the effects of drugs offered through expert testimony – arising within a case or when citing other cases – tended to be accepted as undisputable fact.

Expert testimony was discussed in several of the judicial decisions included in this study. Eight of the judicial decisions cited past cases as sources of expert testimony.[579] Each of these cases cited past cases for information about the personal or social effects of drugs or the nature of trafficking and were accepted as fact. Three judicial decisions found no basis for expert opinion for a person who testified.[580] Of 24 judicial decisions that included direct expert testimony, a majority (n=14) included law enforcement personnel who provided estimates about the value of drugs seized or described the nature and

[579] *Alcantara, supra* note 454; *Cormier, supra* note 573; *Frazer, supra* note 455; *Lucas, supra* note 543; *Massey, supra* note 439; *Normore*, 2005 AJ No 543, 2005 ABQB 75, 386 AR 69 [*Normore*]; *R v Shusterman*, 2012 BCJ No 484, 2012 BCSC 362, 2012 CarswellBC 2401; *White, supra* note 138.
[580] *R v Ahmed*, 2007 OJ No 5838, 2007 CarswellOnt 7357 [*Ahmed*]; *R v Derycke*, 2016 BCJ No 2053, 2016 BCPC 291; *Normore*, *supra* note 579.

effects of trafficking, particularly in relationship to criminal organizations.[581] Again, this information was considered reliable.

Eleven cases include experts such as medical specialists, forensic toxicologists, staff at addiction treatments centres, criminologists, and psychopharmocologists.[582] The degree to which knowledge shared from these experts was varied. There appeared to be an expectation that experts could and should present research in ways that are unbiased or to bracket[583] personal opinions from their presentation of empirical data. These expectations and underlying assumptions are conveyed in the consideration of evidence provided by Dr. Ryan McNeil and the late Dr. Harold Kalant in separate cases. In *Ellis,*[584] Dr. McNeil responded to direct questions from the Crown and judge about "what would constitute an appropriate criminal justice response to street-level traffickers who suffer from substance use disorders."[585] In his response, he mentioned decriminalisation as an approach that has been advocated by some organizations. On appeal the Crown argued that Dr. McNeil incorrectly engaged in 'advocacy':

> As I understand the Crown's position, it accepts that the bulk of Dr. McNeil's evidence was admissible. However, parts of his testimony were improper. The Crown says Dr. McNeil testified about matters for which he was not qualified by the judge to give evidence. Furthermore, he wrongly engaged in "advocacy for the decriminalization of hard drugs", including expressing personal views on "how best to use public funds to combat the opioid crisis." The Crown argues that decriminalization was not an issue before the judge; in any event, public, private and non-profit initiatives aimed at the decriminalization of hard drugs have predominantly focused on possession, not trafficking, and it is up to the federal

[581] *R v Andrews*, 2016 OJ No 5563, 2016 ONSC 5475; *R v Castelein*, 2018 MJ No 57, 2018 MBQB 37; *R v Chesshire*, 2019 BCJ No 2315, 2019 BCSC 2070; *Cook, supra* note 434; *Grant, supra* note 541; *Jordan, supra* note 517; *Kim, supra* note 429; *Mazerolle, supra* note 464; *Mitchell, supra* note 157; *R v Moore*, 2009 BCJ No 2880, 2009 BCSC 1926, 2009 CarswellBC 3900, 94 WCB (2d) 189; *Rosales, supra* note 440; *Sidhu, supra* note 576; *Ursino and Dracea, supra* note 445; *White, supra* note 138.
[582] *British Columbia (Director of Civil Forfeiture) v Wolff*, 2012 BCJ No 2420, 2012 BCCA 473, 330 BCAC 161, 357 DLR (4th) 437, 297 CCC (3d) 391, 2012 CarswellBC 3628, 221 ACWS (3d) 337 [*Wolff*]; *PHS v Canada, supra* note 320; *R v Clay*, 2003 3 SCR 735, 2003 SCC 75, 2003 3 RCS 735, 2003 SCJ No 80, 2003 ACS no 80 [*Clay*]; *Ellis* 2022, *supra* note 44; *Feser, supra* note 422; *Grant, supra* note 541; *Guilbride, supra* note 442; *R v Maruska*, 1981 60 CCC (2d) CanLII 3299 (QC CS) [*Maruska*]; *Normore*, *supra* note 579; *R v Turmel,* 2001 QJ No 5875, 2002 RJQ 246, JE 2002-213 [*Turmel*].
[583] The term 'bias' is commonly used in quantitative research, whereas the term 'bracket' is more commonly used in relation to qualitative research. Both terms reflect an assumption that researchers are expected to – and are able to – remain 'neutral' in the production of research. There are schools of thought that contest the possibility of neutrality in any research (see Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford: Oxford University Press, 2005).
[584] *R v Ellis,* 2021 BCJ No 2584, 2021 BCPC 280 [*Ellis* 2021]
[585] *Ellis* 2022, *supra* note 44 at 96.

> government, not the Provincial Court, to determine what conduct should be proscribed as criminal and the sanctions for it.[586]

A SIGNIFICANCE of this argument is that advocacy is framed as inherently biased and untrustworthy. By interpreting the expert's account as advocacy, the scientific merit of the knowledge claims are excluded, regardless of whether the information itself is trustworthy. The Honourable Justice Ian Binnie observed, "it easier and more effective to discredit the expert witness than to demolish the scientific basis on which the witness's testimony rests."[587]

In contrast, Dr. Kalant testified in a number of cases related to cannabis. In *Normore*, his contributions of evidence were considered to be presented in a 'neutral way':

> In addition to testifying in *Malmo-Levine* he testified over two days in this case. Dr. Kalant is a medical doctor who is qualified as an expert in the fields of health and psychopharmacology and particularly with the respect of the health effects of marijuana. He provided an expert testimony in the form of a review article entitled "Adverse Effects of Cannabis on Health: An Update of the Literature since 1996"(Exh. 14). This article was a peer reviewed article published in the journal Progress in Neuropsychopharmacology and Biological Psychiatry in early 2004. Like a number of other courts who have heard Dr. Kalant testify, I was impressed with the careful and *neutral* way in which he gave his evidence. He withstood vigorous cross-examination[588] [emphasis added]

Conveyed here is a suggestion that both trustworthiness and admissibility is contingent on conveying information in a neutral manner that does not attempt to sway legal opinion one way or another.

It was reported that during the hearing for *Ellis,*[589] counsel for Ellis asked Dr. McNeil what the criminal justice system "can do to reduce the harm associated with the opioid crisis" and he replied that a number of organizations have "advocated for drug decriminalization."[590] He reported that current research:

> …point[s] to the same conclusion, that our current approach to criminalizing drug use really does nothing but drive harm, including increasing overdose

[586] *Ellis* 2022*, supra* note 44 at 65.
[587] The Honourable Mr. Justice Ian Binnie, "Science in the Courtroom: The Mouse that Roared" (2007) 56 UNB JL 207 at 312.
[588] *Normore, supra* note 579 at 49.
[589] *Ellis 2021*, *supra* note 584.
[590] *Ellis 2022, supra* note 44 at 93.

> risks, while really not producing positive outcomes for people, and really calling into question whether or not it should … continue to be pursued as … a primary approach to substance use.

The Crown directly asked Dr. McNeil "what he would 'suggest that we do' if trafficking in fentanyl at the street level is not addressed through incarceration or probation orders that mandate medication-based treatments."[591] Dr. McNeil replied,

> Well, we, as a society? If I may take it there … certainly the encouraging work that we've been doing around the implementation of safer supply programs suggest that there's a number of other pathways to address harms associated with drug selling … be it treatment, be it a safer supply program, or something in between … I think we could all agree there's this incredible tension right now in relation to the overdose crisis and how we're dealing with it, as a society, between public health or medical approaches and the criminal justice system … it's for example, very expensive to incarcerate people and associated funds could likely go a long way to funding the types of evidence-based programs that could reduce these harms that I think we could agree about doing.[592]

In McNeil's response to direct questions, he appears to invite a discussion about broadening potential societal approaches while acknowledging tensions using discursive hedging (i.e., "suggest," "or something in between," "I think," "likely"), as a means of conveying uncertainty rather than declarative statements.[593]

As socially and politically situated researchers, the works and opinions of both Dr. McNeil and Dr. Kalant are informed by their own worldviews and understandings about the place of drugs in society. In his writing, Dr. Kalant argues that drug laws ought, in fact, to be guided by value judgments and subjective personal criteria:

> It has been proposed that classification should be conducted by scientists and drug experts rather than by politicians, so that it will reflect only accurate factual knowledge of drug effects and risks rather than political biases. Although this is an appealing goal, it is inherently impossible because rank-ordering of the drugs inevitably requires value judgements concerning the different types of harm. Such judgements, even by scientists, depend upon subjective personal criteria and not only upon scientific facts. Moreover, classification that is meant to guide the legal system in controlling dangerous drug use can function only if it is in harmony with the values and sentiments of the public. In some respects, politicians may be better

[591] *Ibid* at 94.
[592] *Ibid* at 94.
[593] Declarative statements could include words like "must," "unequivocal," and "certain."

> attuned to public attitudes and wishes, and to what policies the public will support, than are scientific experts.[594]

By asserting that value judgments and subjective personal criteria influence the work of scientists, Dr. Kalant reveals he views value judgement as an inherent part of the law-making process and scientific reasoning. A brief review of peer-reviewed literature reveals that Dr. Kalant took a firm stance against legalization of cannabis, advocating instead for the merits of decriminalization.[595] In his work, Dr. McNeil has presented the decriminalization as a potential strategy to reduce drug-related harms.[596] Whereas Dr. Kalant was a pharmacologist who conducted research on the physiological effects of drugs on the human body, Dr. McNeil conducts qualitative and ethnographic research to examine "social, structural, and environmental influences on risk, harm, and health care access among people who use drugs."[597] Given differences in the types of research each of these experts is engaged in, it is understandable their presentations of knowledge would differ. Dr. Kalant's work would more likely be considered 'bench science' that is often, incorrectly, believed to be less susceptible to researcher influence.[598] Furthermore, the two researchers were speaking to different types of harm.[599] Dr. Kalant was asked about the "health effects of marijuana," whereas Dr. McNeil was asked about "(a) overdose risk, prevention and harm reduction; (b) demographics of drug users in British Columbia; (c) physiology of opioid addiction (including the effectiveness of denunciation and deterrence on drug users); and (d) drug jargon and slang."[600]

---

[594] Harold Kalant, "Drug Classification: Science, Politics, Both or Neither?" (2010) 105:7 Addiction at 1146.
[595] Harold Kalant, "A Critique of Cannabis Legalization Proposals in Canada" (2016) 34 Intl J Drug Policy at 5.
[596] Geoff Bardwell et al, "'People Need Them or Else They're Going to Take Fentanyl and Die': A Qualitative Study Examining the 'Problem' of Prescription Opioid Diversion During an Overdose Epidemic" (2021) 279 Soc Sci & Med 113986; Jennifer Lavalley et al, "Reconciliation and Canada's Overdose Crisis: Responding to the Needs of Indigenous Peoples" (2018) 190:50 CMAJ E1466; Ryan McNeil, Marie Jauffret-Roustide & Helena Hansen, "Reducing Drug-Related Harms and Promoting Health Justice Worldwide During and After COVID-19: An AJPH Supplement." (2022) 112:S2 Am J Pub Health S95.
[597] "Ryan McNeil" (Retrieved on 1 May 2023) online: *University of British Columbia* <https://pwias.ubc.ca/community/ryan-mcneil/> [perma.cc/9UAG-VEJM] at para 1.
[598] Latour, *supra* note 583.
[599] *Normore, supra* note 579 at 49.
[600] *Ellis 2022, supra* note 44 at 92.

Although criteria have been developed to interrogate the admissibility of expert testimony,[601] the impact of the information appears to be influenced by the degree to which the delivery of information is conducive to 'neutral' presentation. Neutral presentation of data is more likely to align with post-positive, quantitative research, which relegates social sciences to be viewed as less trustworthy, as discussed in section 1.4.4.1.

A similar interpretation about expert reliability was made in *Turmel* when weighing evidence provided by Dr. Kalant in three preceding cases. Dr. Kalant was cited as explaining that "marijuana is not a very dangerous drug, compared to hard drugs. Its use does not make people more violent or aggressive. Moreover, there have been no reported deaths from the consumption of marijuana alone," but more research is needed about long-term effects "since it is not completely harmless."[602] Dr. Morgan is cited as asserting there is evidence for therapeutic use of cannabis, there are possible harmful effects, and "marijuana is not dangerous but a safe drug."[603] However, Dr. Morgan "admits he is a strong advocate of the medical use of marijuana and in favour of smoked marijuana" and is "strongly in favour of marijuana decriminalization."[604] Despite the similarities in the evaluations about the harmfulness of cannabis, the Justice Plouffe found that "Dr Morgan lacks objectivity. He tends to minimize the harmful effects of the use of smoked marijuana and also the need for further research about its long-term effects."[605]

It has become commonplace for accounts about drug use that do not conform to dominant discourses to be described as rationalization, justification, intellectualization, or minimization and discounted as false and "to directly dispute dominant discourses of drug use opens one to being discounted as a reliable authority on the subject."[606] When

---

[601] See *Mohan, supra* note 164, where admission of expert testimony was defined to depend on the following criteria: (a) relevance, (b) necessity in assisting the trier of fact, (c) the absence of any exclusionary rule, (d) a properly qualified expert.
[602] *Turmel, supra* note 582 at 89.
[603] *Ibid* at para 103.
[604] *Ibid* at para 105.
[605] *Ibid* at para 106.
[606] Niki Kiepek, "Exploring Legitimacy and Authority in the Construction of Truth Regarding Personal Experiences of Drug Use" (2016) 7:2 Addict Research & Therapy at 281.

weighing evidence from expert testimony, it is important to consider the *quality of the evidence* that is informing the reasoned opinion.

What remains unresolved in this assessment of objectivity is how one differentiates between minimizing or, potentially emphasizing effects. Are scientists expected to not consider the real-life application of research and ignore the implication of findings to inform law, politics, and justice, or to at least not publicly voice their evidence-informed interpretations? Dr. Kalent's testimony was strengthened by the fact that he did not officially publish his political stance on legislation until 2015, thus maintaining an illusion (however unintentional) of objectivity.

This analysis shows there was very little inclusion of expert testimony introducing knowledge gathered through empirical research in the judicial decisions. When this knowledge was included, if the expert was evaluating of having a personal (or professional) opinion about the meaning of the knowledge and implications within society, this expert was general viewed to lack objectivity. There is a tension that arises, as social science research is often expected to inform society and potentially inform policy and law. There is a further risk of discounting experts when their knowledge claims do not conform with dominant political and legal positions. When expert opinion conforms with dominant perspectives, there is a greater possibility those experts will be viewed as more objective.

Experts who report findings from empirical research and judges share similar goals and face similar challenges when it comes to interpreting the information that comes before them. Both judges and experts who report empirical evidence face complex and often contradictory knowledge claims. Both must evaluate the reliability and strength of the evidence based on a comprehensive review that, ideally, relies on more than one evidence source. Both contemplate how the information relates to society more broadly and to individual cases specifically. Both are embedded in social processes and are guided by personal and professional values. Jennifer Nedelsky says, "To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to be in conversation as they make their judgments. Whom do they imagine persuading and on

whom do they make claims of agreement?"[607] Similar questions can be asked of of experts who report empirical evidence. In addition to this, there is a need to contemplate on the ways in which expert opinion is interpreted or accepted when the epistemologies and values of experts and judges conflict.

3.2.4 Spaces for Nuanced Interpretation of Sentencing Principles

This section of the analysis diverges from the critical discourse analysis methodology, tending more towards a content analysis. In the reviewed cases, judges rarely contested laws or interpretation of legal principles when providing their rationale for sentences. Rationales tended to follow a linear consideration of the position of the two parties, discussion of select sentencing principles, and consideration of aggravating and mitigating factors, followed by delivery of a sentence that conformed with past cases and dominant perspectives about drugs. However, there were instances when the reasoning presented by the judge conveyed somewhat more nuanced, reformatory perspectives on the effects of drugs or the application of law. In CDA, this may be referred to as DISTANCING and also generally involves INTERTEXTUALITY, where another point of view is referenced and the speaker/writer subtly or directly demonstrates a lack of endorsement. In the decisions I reviewed, such nuances were evident in positions around the harm of drugs and interpretation of legal principles.

First, although most judges appeared to hold a belief that the longer the length of a sentence,[608] the more likely the offender and others would be deterred from engaging in

[607] Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42:1 McGill Law J 91 at 107.

[608] The judge in *R v Martineau* 1990 2 SCR 633 at 680 cites Crumps discuss (at 370) to indicate the broad relevance of deterrence:

> The conclusion does not follow, however, that felons cannot be deterred, or that criminals are so different from other citizens that they are impervious to inducements or deterrents that would affect people in general. There is mounting evidence that serious crime is subject to deterrence if consequences are adequately communicated.

similar conduct in the future, not all judges shared this belief.[609] For instance, in *Etmanskie*, which pertained to cocaine and crack cocaine, Whalen P.C.J. distanced herself from this principle, stating "I do not think Mr. Etmanskie should be sacrificed on the altar of general and specific deterrence and forgo any possible hope of rehabilitation."[610] *Song* was an appeal in relation to cannabis use.[611] The trial judge is quoted as saying "nobody has been deterred. People have been going to jail for drug offences for -- for a couple of generations now and the drug -- the drug plague is worse than it ever was."[612] On appeal, the trial judge was found to have "erred in treating the principle of appellate deference to sentencing judges as leave to impose with impunity a sentence based on his personal views of national drug policy."[613] In this case, the trial judge was found to have failed to take into account the principle of deterrence.

Second, when considering information about the proposed severity of substance use and trafficking in Canada and regionally, a majority of judges tended to present this as a rationale for the need for denunciation and to demonstrate the gravity of the offence. In some instances, judges cautioned against drawing connections of individual culpability with the severity of what is claimed to be a crisis, scourge, or plague. In *Wolff,*[614] a case which pertains to cannabis, the judge considered the principles of proportionality and fairness. Justice Newbury held that the accused should be held liable for their individual actions, not for the "diffuse harms"[615] suffered by society as a whole or for the "actions of others ..."[616] The CONNECTION of possession for the purpose of trafficking to societal harms was thus diminished.

Another example was seen in *Mitchell,* a case pertaining to cocaine, fentanyl, and methamphetamine. Justice Betton provided an overview of the number of fentanyl

---

[609] While outside the scope of analysis for this thesis, it would be worth further exploring factors that influence judicial values and opinions about sentencing principles, such as age, race, gender, familial socioeconomic status, region of Canada, institution of legal education, and so on.
[610] *Etmanskie, supra* note 446 at para 74.
[611] *R v Song*, 2009 OJ No 5319, 2009 ONCA 896, 249 CCC (3d) 289, 257 OAC 221, 100 OR (3d) 23.
[612] *Ibid* at 4.
[613] *Ibid* at 4.
[614] *Wolff, supra* note 582.
[615] *Ibid* at para 25.
[616] *Ibid* at 2.

toxicity deaths in British Columbia to clarify an opinion that people selling fentanyl would be aware of the contemporary risks associated with that particular drug. He says,

> There is no evidence before me to indicate that any of the drugs Ms. Mitchell was involved in selling and making available to the street-level dealers contributed to any of those deaths. That is not the point that I seek to make.[617]

Again, Justice Betton challenged CONNECTIONS, which are replete in previous cases, related to possession for the purpose of trafficking and wide-reaching societal harms.

Similarly, in *Campbell,* a case related to fentanyl, cocaine, methamphetamine, Justice Ker declared, "Mr. Campbell must be sentenced for his criminal conduct and must not be made a scapegoat for all harms caused by fentanyl"[618] and went on to say "vengeance, a concept often confused with retribution, plays no role in the criminal justice system."[619]

Third, some judges criticized the very laws they were expected to uphold. In *Clunis,* a case related to cocaine, Justice Odonnell was bound to sentence within the constraints of MMPs, and was clearly dissatisfied with not being able to consider conditional sentencing:

> I dare say that many judges wonder why it has taken so long for a government that said it would undo many of the sentencing restrictions that were enacted by the previous government. I cannot say that those judges are wrong. However, the legitimacy of our democratic structure depends on legislators legislating and on judges judging. Judges doing end runs around Parliament is toxic to democracy. It undermines democratic institutions and it undermines the legitimacy of the judiciary.[620]

The judges in *Ellis,* a case pertaining to fentanyl, considered the Vancouver Area Network of Drug Users (VANDU) perspective that "[h]arshly punishing these individuals

---

[617] *Mitchell, supra* note 150 at para 29.

[618] *Campbell, supra* note 576 at para 51. In *Campbell* at para 52, retribution is described as:

> an accepted, and indeed important, principle of sentencing in our criminal law. As an objective of sentencing, it represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender…. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of the particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct.

[619] *Ibid* at 52.

[620] *R v Clunis,* 2018 OJ No 1627, 2018 ONCJ 194 at para 24.

for a crisis that claims them as its victims is perverse."[621] Many people charged with trafficking fentanyl experience a substance use disorder and other socially marginalizing situations, such as homeless and poverty. Dr. McNeil was cited, asserting, "criminalizing drug use really does nothing but drive harm, including increasing overdose risks, while really not producing positive outcomes for people."[622] This case was heard in 2022, when a broader range of sentences – beyond incarceration – were being considered. The judges again cited McNeil who argued that it is "very expensive to incarcerate people and associated funds could likely go a long way to funding the types of evidence- based programs that could reduce these harms."[623] With respect to deterrence, the judges expressed, "in isolation, jail sentences and the involvement of the criminal justice system has not been effective in stemming the flood of fentanyl in the drug supply."[624] This case offers the most explicit example of a shift in judicial reasoning toward arguments consistent with those that favour decriminalization. In this case, INTERTEXTUALITY enhances the SIGNIFICANCE of advocacy toward law reform.

A 2008 case, *Ahmed,*[625] pertained to a young man attempting to bring khat into Canada as a traditional part of the marriage ceremony. Justice Allen realized that "The criminalization of [khat] affects only a visible minority, the north-eastern African immigrants for whom it is to some extent a cultural tradition."[626] Referring to research demonstrating little to no harm associated with khat, Justice Allen issued an absolute discharge, noting "harm to others as generally a prerequisite to punishment and it is hard to know what the basis for punishment is if there is no identifiable harm to other people."[627]

Fourth, and finally, five of the included cases referred to *Chen* when considering CSO. In *Chen,* Justice Schultes declared s. 742.1(c) of the *Criminal Code inter alia* to be of no force and effect. Prior to this decision, anyone convicted of trafficking or possession for

[621] *Ellis 2022, supra* note 44 at para 56.
[622] *Ibid* at para 93.
[623] *Ibid* at para 94.
[624] *Ibid* at para 101.
[625] *Ahmed*, *supra* note 580.
[626] *Ibid* at para 6.
[627] *Ibid* at para 7.

the purpose of trafficking would be sentenced to incarceration, unless there were exceptional circumstances. Justice Schultes concluded:

> In my opinion, in choosing the means that they did to achieve the legislative purpose, even if it is broadened somewhat in the manner I have referred to, Parliament chose a method that affected offenders who were unconnected with its purpose – specifically offenders who committed offences that have high maximums, but that involved circumstances in the lower range of seriousness. In doing so, they created effects that were overly broad and thereby breached s. 7.
>
> In reaching this conclusion, I also agree with Feldman J.A. that standing alone maximum sentences are useful indicators of the gravity of the offence, but that unless they are coupled with an understanding of the circumstances of the specific offence and offender, they say nothing useful about the seriousness of the offence for the purpose of fulfilling the legislative purpose.[628]

As a result, of the included case that considered *Chen* and resulted in a sentence of less than two years, *Aeichele, Howard,* and *Webber* resulted in a CSO.

3.2.5 Summary of Discussion

In this section, I presented diverse research findings. The first theme I explored was the discursive construction of trafficking as a profit driven enterprise and motivated by greed. Trafficking was portrayed as highly connected to organized crime and the effects of drugs as highly harmful. Such constructions arose largely from citing past cases, with little reference to empirical research. The effect was largely to emphasize the perceived gravity of the offence.

The second theme related to the construction of drugs and harm, with a focus on fentanyl, MDMA, and cannabis, all of which were classified as controlled substances at the time the cases were heard. The way that harm was constructed varied across these three types of drugs. Fentanyl was portrayed as inherently harmful, with a high reliance on moralization language. Risk for harm neglected analysis of systemic or societal factors that pose disproportionate harm to certain populations. MDMA was constructed as harmful based on variable judicial opinion and interpretation of available empirical

[628] *Chen, supra* note 154 at section 206-207.

research. The harms of cannabis were constructed through the inclusion of several experts and review of research reports. The medical benefits were validated and constructed as a constitutional right. However, the potential for harm to be experienced by certain vulnerable groups was considered sufficient rationale for criminalization.

The third theme related to discursively constructing the gravity of the offence and moral culpability as directly connected to the perceived harmfulness of the drug.

Finally, the fourth theme identified minimal inclusion of empirical research. When offered by expert testimony, the objectivity of the expert was more likely contested than the quality of the evidence they were presenting.

In the next section, I offer interpretations of the findings as situated in the literature.

CHAPTER 4 DISCUSSION

The findings of my research align with theories that that *values and ideology are discursively embedded in judicial decisions* and law. In this discussion, I interpret and situate the findings in context of existing literature with the intent of facilitating novel understandings. I start by examining the discursive *construction* of harm, which was the original aim of this thesis. This is followed by a discussion about emergent findings that uncover opportunities for reforming social approaches to drugs in the context of judicial decisions. Recommendations include: i) accurately understanding and representing harm, ii) refraining from legitimizing moralization and stigma in judicial decisions, and iii) improving evidence informed law and research literacy.

4.1 DISCURSIVE CONSTRUCTIONS OF HARM

The data demonstrates that, in Canadian case law, knowledge about drug-related harm inconsistently informs judicial decisions pertaining to the importation, production, possession, and trafficking of drugs. In actuality, there is little to no citation of the wealth of empirical research available . Despite harm being mentioned in three of the six sentencing objectives of Section 718 of the *Criminal Code*, representations of harm are varied, with a high degree of inconsistency about how harm is considered in sentencing. When discussing the degree of harm, lawyers and judges refer to claims of harmfulness in past cases, occasionally invite experts, and in some instances draw on secondary sources. In many instances, harm was mentioned in relation to drugs with little to no elaboration and substantiated solely through citation of previous cases.

Despite the overarching inconsistency in interpretations of harm and considerations of harm in sentencing, some dominant beliefs and practices were in evidence. There appeared to be a prominent belief that the more dangerous or harmful the drug, the higher the sentence should be. One approach to extrapolate the extent of harm was to explicitly describe perceived relative harms of drugs in relation to one another; for instance, if fentanyl is determined to be more dangerous than cocaine, the reasoning goes, the sentence should be higher. Another common approach was to include a rhetorical

statement about the harm of drugs, without any elaboration or evidence. A third approach was to refer to the classification of the drug on the *CDSA* as an indication of risk for harm, with those in Schedule I largely understood to mean those drugs have been determined by an authoritative body – by some unknown criteria – to be more harmful and pose a greater threat to the public.

Consistencies in representations of harm largely arose from adopting the language used in previous cases. This highlights the importance of intertextuality in case law, which functions to reify particular perspectives and legal interpretations. The contemporary framing of fentanyl-related harms is a clear example, with moralization language used in *Parranto* explicitly or implicitly reproduced in many future sentences, lending to interpretations about the perceive high gravity of the offence, reinforcing the importance of denunciation and deterrence.

Construction of harm tended to emphasize different features, aligned with connections to specific sentencing principles. Denunciation and deterrence were by far the most commonly named sentencing principles pertaining to trafficking, though rehabilitation, mitigating factors, and aggravating factors were also considered to various degrees. Denunciation and deterrence often tended to be presented as taken-for-granted considerations in drug-related cases. Proportionality was a principle that typically involved more in-depth rationale about the range of the sentence (determined by citing previous cases) and the gravity of the offence (through a discursive construction of harm).

In *Spence,* the SCC examined the scope of judicial notice for "social" facts.[629] They cite *Find*, where:

> a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[630]

[629] *R v Spence*, 2005 3 SCR 458, 2005 SCC 71 [*Spence*] at 460.
[630] *Find, supra* note 355 at 864.

The recommendation in *Spence* was that "even legislative and social 'facts' should be established by expert testimony rather than reliance on judicial notice… Litigants who disregard the suggestion proceed at some risk."[631] Failing to accurately and appropriate use empirical research and/or expert testimony that presents empirical research and, instead, citing past cases that report on drug-related harm, risks using a form of inappropriate judicial notice, where "what 'everybody knows' may be wrong"[632] – or, more accurately, what 'everybody knows' may be partial and incomplete. Examples of sources for knowledge about drugs and the impact of drugs in Canada include: peer-reviewed journal articles, peer-reviewed textbooks, Royal Commission of Canada, Statistics Canada, World Health Organization, United Nations, Canadian Institute for Health Information, and Public Safety Canada.

Although legal conservatism was evident, with a high commitment to uphold current laws, regardless of personal values of judges, harms associated with *drug laws* were discussed by a few judges. Some acknowledged that oftentimes people who use and sell drugs are marginalized members within society. The criminalization of drugs (particularly drug trafficking) is thus understood to victimize people who are already disadvantaged. Underlying this reasoning are questions of volition and choice. In these small number of judicial decisions that consider harms of criminalization, there is general acceptance that the motivation for trafficking is not greed; rather, it is asserted that addiction influenced the conduct. As such, when people sell drugs but do not use drugs, they are held to a higher degree of responsibility.

At the same time, some judges grappled with the misalignment between the criminalized status of drugs in relation to a perceived lack of harm to other people. At the same time, the judges in *Malmo-Levine* ultimately asserted:

> There is no doubt that our case law and academic commentary are full of statements about the criminal law being aimed at conduct that "affects the public", or that constitutes "a wrong against the public welfare", or is "injurious to the public", or that "affects the community". No doubt, as stated, the presence of harm to others may justify legislative action under the criminal law power. However, we do not think that the absence of proven harm creates the unqualified barrier to legislative

[631] *Spence, supra* note 629 at 68.
[632] *Ibid* at 485.

> action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused.[633]

In substantiating this argument, they cite in *Butler* where it was asserted that it is open to Parliament to legislate "on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."[634]

In effect, the decision in *Malmo-Levine* upheld the criminalization of cannabis possession by both condemning conduct that is not entirely harmless and claiming that harmfulness need not be definitive when research is not available and "the jury is still out."[635] It was determined that an important role of the court was to "safeguard the moral values that are fundamental to a free and democratic society…. [within] the Canadian reality, in which it is accepted that social morality and criminal law are inextricably linked."[636] The court went on to explain, "the state's intervention in punishing a crime is generally the expression of a popular consensus condemning socially reprehensible conduct."[637] Reflecting on this argument, alongside the early analysis of the inclusion of expert testimony, if harm is not the sole or most influential factor, testimony pertaining to popular consensus, social morality, and social values might very well be invited rather than excluded from judicial decisions.

However, this entire reasoning around harm needs to be untangled. Given there are likely no drugs that are entirely without direct or indirect potential for some harm to some people – and, indeed, very few activities at all without harm[638] – it is virtually impossible

---

[633] *Ibid* at para 115, citing *R v Butler*, 1992 1 SCR 452, 1992 1 RCS 452, 1992 SCJ No 15, 1992 ACS no 15 at 493.
[634] *Ibid* at para 116.
[635] *Ibid* at para 52.
[636] *Ibid* at para 286.
[637] *Ibid.*
[638] For instance, engaging in public transportation can pose risk for harm. Road traffic injuries are the leading cause of death among people 5-29 years old, with 93 percent of fatalities occurring in low- and middle-income countries, as reported by the World Health Organization, "Road Traffic Injuries" (2021), <https://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries> [perma.cc/DE5N-GC3D] [World Health Organization, "Road Traffic Injuries"]; From a global health and ecological justice perspective, roads and railways extensive world-wide footprint of roads and railways results in high rates of wildlife collision and mortality, as reported by J N Popp & S P Boyle, "Railway Ecology: Underrepresented in Science?" (2017) 19 Basic & Applied Ecol 84.

to argue against criminalization of *any* drug (or most any other activity for that matter). That said, there is also the notion that even if harm, as conventionally conceived, is low or negligible, it may be criminalized according to morality and values. The example of cannabis, which was the drug addressed in *Malmo-Levine*, serves as an example of the tenuous nature of relying on morals and values in shifting public landscapes. In 2004, the *Canadian Tobacco Use Monitoring Survey* (CTUMS) conducted by phone found that 45 percent of adults aged 18 years and older reported using cannabis at least once in their lifetime and 14 percent had used in the past-year.[639] It is reasonable to consider this as an estimate, as people may under-report use on telephone surveys as compared to anonymous surveys. As noted in Appendix A, in 2022, past-year use was reported to be 27 percent.[640] Questions that arise when criminalizing conduct are: Whose morals and values are informing the condemnation of particular activities? How is the public involved in decision-making? What sources of knowledge are being included or silenced and how responsive are legal and political processes to institute changes about how conduct is regulated? What is the current "social and factual landscape"?[641]

Although harm features prominently in Section 718, judges have little guidance about how to consider or evaluate harm and are unclear about how to impose sentences fairly when harm to others is less evident. Judges may consider a range of complicated evidence, which can include other cases, legal theory, empirical research, and expert testimony. It is preferable that judges reduce the likelihood of drawing erroneous conclusions by implementing evidence-informed law, which can be achieved by improving research literary skills among lawyers, judges, and paralegals. This will be discussed in greater detail in Section 4.2.3. It is equally important to mitigate legal fictions that can arise from reifying partial understandings of complex conduct and concepts. Whereas Fuller's definition of legal fiction includes a degree of awareness about a statement's falsity, current theories about stigma and oppression would suggest

---

[639] Scott T Leatherdale, David G Hammond, Murray Kaiserman & Rashid Ahmed, "Marijuana and Tobacco Use among Young Adults in Canada: Are They Smoking What We Think They are Smoking?" (2007) 18:4 Cancer Causes & Control 391.
[640] Government of Canada, "Canadian Cannabis Survey 2022: Summary" (2022), online: <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/research-data/canadian-cannabis-survey-2022-summary.html> ["Canadian Cannabis Survey"].
[641] *Carter v Canada* (Attorney General), 2015 SCC 5, 2015 1 SCR 331 at 356.

that people are often unaware of the harmful impact of their beliefs, words, and/or conduct. When describing the harms associated with drugs, it is important to become aware of the potential for tropes[642] to become viewed as a sort of truth. confronts tropes embedded in law that perpetuate injustices, noting:

> Considering the power of the judiciary to determine what is legal and what is illegal, what is a crime, and who is to be punished, the tropology[643] of the law especially need watching. As civil-rights-black-power activist Stokely Carmichael observed in 1967, "It [definition] is very, very important because I believe that people who can define are masters…. When the courts speak through their opinions, they speak as 'people in power' and 'master,' and as just they have the power to define and impose their tropes, directly and indirectly. Through the reliance on precedents, the repetitive citation of legal tropes becomes increasingly influential. The written and published opinion, relying on precedents, repeats the tropological arguments, further institutionalizing figuratively expressed principles, doctrines, standards, and premises. The reliance increasingly embeds the repeated tropes in the legal landscape. The figurative phrases, Justice Holmes (who has contributed his share of such phrases) observed, lead to ideas becoming 'encysted in phrases and therefore for a long time cease to provoke further analysis.'"[644]

The reliance on precedent and repetitive citations about harm, as previous discussed, such as "profit from the misery of others," "preying on the weak and the vulnerable," "most heinous of all crimes, "scourge to society," "parasitic profit-making," "the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette," "spreading the misery of addiction," and "preying on users' addiction and misery" are examples of legal tropes. Cautions against unreflexive reproduction of tropes aligns with Judge Berger's reluctance to endorse exaggerated and "hysterical" [645] representations of cocaine:

> It would be unwise to characterize cocaine in this exaggerated language.[646] It is precisely the way in which our institutions become discredited, and those curious

---

[642] In "Metaphor and Reason," Bosmajian examines metaphors, metonymies, and personification. Tropes are figurative or metaphorical uses of words or phrases. He provides examples of words used by Hitler and the Nazis to refer to people of Jewish descent, such as vermin, parasites, and plague. Such language serves to establish particular power relations and contributes to processes of dehumanization. An example of personification is attributing humanness to the concept of justice.

[643] In this context, the word tropology appears to refer to a compilation of legal tropes.

[644] Bosmajian, "Metaphor and Reason", *supra* note 1 at 17-18.

[645] *R v Bengert, Robertson et al,* (No 14), [1979] BCJ No 2052, 52 CCC (2d) 100, 15 CR (3d) 97, 4 WCB 205 [*Bengert*] at 22.

[646] This is discussed in more detail of the Discussion section of this thesis. In this situation, the judge is speaking about the portrayal of cocaine as increasing the likelihood for the person using to commit rape, to experience psychosis, and to be at risk for addiction.

about the effect of cocaine and other drugs discount, even reject, warnings emanating from the medical profession and the courts.[647]

In the following sections, I explore some approaches to consider when articulating a rationale of harm, without relying on tropes and without inadvertently producing or reproducing legal fiction.

4.2 REFORMING SOCIAL APPROACHES TO DRUGS

In 2019, the United Nations Chief Executives Board for Coordination committed to promote "alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use."[648] This echoes President Jimmy Carter's 1978 statement that, "penalties against possession of a drug should not be more damaging to an individual than the drug itself."[649] The United Nations Special Rapporteur on the Right to Health explains that the criminalization of drug possession results in people who require health services to be inappropriately and inhumanely incarcerated.[650] Alexander Sculthorpe posited that courts are in positions of needing to weigh increased *risk of harm* from engaging in criminalized conduct with *the certain harm* of the criminal sanction, such as imprisonment.[651] A criminal record poses a barrier to employment, education, and other types of social inclusion, and can result in discrimination.[652] Furthermore, drug enforcement policies are understood to worsen violence within criminal drug markets.[653] Winnie Byanyima, UNAIDS Executive Director, declared: "UNAIDS calls for the full involvement of communities of people who use drugs in achieving legal reform aimed at decriminalization and in the

---

[647] *Bengert, supra* note 645 at 29.
[648] UN Summary of Deliberations, *supra* note 364 at 14.
[649] US President Jimmy Carter, cited by Paula Mallea, *The War on Drugs: A Failed Experiment* (Toronto: Dundurn, 2014); Also see Kojo Koram, *The War on Drugs and the Global Colour Line* (London, UK: Pluto Press, 2019).
[650] Special Rapporteur on the Right to Health, "Drug Policy and Drug Use" (2023), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/special-procedures/sr-health/drug-policy-and-drug-use> [perma.cc/2EA5-ULU6].
[651] Alexander Sculthorpe, "A Second Chance for the Harm Principle in Section 7: Gross Disproportionality Post-Bedford" (2015) 20 Appeal: Rev Current L & L Reform 71.
[652] *Ibid.*
[653] *Ibid.*

organization of harm reduction programmes at the country level."[654] The World Health Organization has similarly called for countries to "work toward developing policies and laws that decriminalize injection and other use of drugs and, thereby, reduce incarceration.[655] Legislative reform is needed, though incremental changes can occur judicially.

Judicially, the law is often viewed as "a stabilizing force rather than an instrument of change," arising from conservatism of the legal profession and the common law tradition which looks backwards to precedent for resolving problems of the present."[656] It is argued,

> The judicial record in the area of criminal law and punishment substantiates the charges of judges' opposition to penal reform and their reluctance to use the knowledge and experience offered by the modern sciences of criminology and penology. An exhaustive examination of judicial attitudes toward penal reform clearly shows that judges have in the past almost unanimously opposed humanitarian reforms in methods of punishment and other reforms aimed at improving the administration of criminal justice.[657]

At the same time, judges *do* render decisions that legislation is of no force and effect, as seen with *Chen*, or that alter the way a particular legal principle is interpreted and applied.[658]

Under the *Canadian Drugs and Substances Strategy* (CDSS), the Government of Canada expressed a commitment to shift toward public health approaches to respond to substance use issues.[659] The Government of Canada voiced a commitment to drug policy that is

---

[654] UN News, "UNAIDS Upholds Decriminalization, Access to Services, on International Drug Users' Day" (1 November 2021), online: <https://news.un.org/en/story/2021/11/1104552> [perma.cc/RYU4-6SJ].
[655] World Health Organization, *Policy Brief: HIV Prevention, Diagnosis, Treatment and Care for Key Populations: Consolidated Guidelines, July 2014* (Geneva: World Health Organization, 2014) at 91.
[656] Shetreet, *supra* note 24 at 411.
[657] *Ibid* at 410.
[658] See also *R v Bissonnette* 2022 SCC 23, which provides and example of "courts' resistance to the excesses wrought by the politicization of criminal justice" as described by H Archibald Kaiser, "Bissonnette: Another Step Forward, After the Harper Decade of Regression in Sentencing" (2022) 81 Criminal Reports CR-ART 343 at 6.
[659] Office on Drugs and Crime, "The Canadian Drugs and Substances Strategy: A Public Health Approach to Substance Use Issues" (September 2018), online: <https://www.unodc.org/documents/commissions/CND/2019/Contributions/Panellists/27_Sept/WEOG_-_Health_Canada.pdf> [perma.cc/BS4C-VMAV].

comprehensive, collaborative, compassionate, and evidence-based,[660] which are values that should likewise be integrated into legal processes.

Under the CDSS, there are nine strategies:[661]

1. Addressing root causes of problematic substance use
2. Better addressing the needs of Canadians living with pain
3. Reducing stigma around substance use
4. Improving access to comprehensive, evidence-based treatment services
5. Exploring innovative approaches to harm reduction
6. Applying a health lens to regulation and enforcement activities
7. Supporting Indigenous peoples
8. Addressing the needs of at-risk populations
9. Grounding substance use policy in evidence

This shift in policy responds, in part to the over-representation of historically marginalized populations in the criminal justice system, including Indigenous peoples, Black Canadians and other racialized communities, those living in poverty, and persons with mental illness.[662] A 2014 report by the Office of the Correctional Investigator concluded that more than 80 percent of people who were federally incarcerated had problems with substance use. Half of the people reported their crime(s) to be linked to personal substance use.[663] With changes to MMPs and the option for diversion, there are additional alternatives for judges to consider in efforts to remediate the over-criminalization of marginalized populations.

Of the nine strategies listed above, I envision potential opportunity for involvement of the judiciary as a social institution, to make minor improvements to redress the following priority areas: i) enhance applications of health and human rights frameworks to

---

[660] HESA Committee Report, "Government Report" (13 December 2016, 42nd Parliament, 1st Session, House of Commons Canada), online: < https://www.ourcommons.ca/DocumentViewer/en/42-1/HESA/meeting-37/evidence> [perma.cc/N3R6-7CE9].
[661] Government of Canada, "Strengthening Canada's Approach to Substance Use Issues" (September 2018), online: <https://www.canada.ca/en/health-canada/services/substance-use/canadian-drugs-substances-strategy/strengthening-canada-approach-substance-use-issue.html>
[662] *Ibid.*
[663] *Ibid.*

regulation and enforcement activities by accurately representing harm, ii) reduce stigma around substance use, and iii) ground substance use policy in evidence.

4.2.1 Accurately Understand and Represent Harm

There are clearly harms that arise from the use of drugs and from drug trafficking, as with other forms of legal[664] and criminalized conduct. A summary of current research about harms associated with drugs was outlined in Appendix A. Harms associated with trafficking of drugs are ill-defined. Returning to the earlier definition of drugs broadly conceptualized, the production and distribution processes of legally regulated drugs, such as alcohol, tobacco, cannabis, and pharmaceuticals are designed to mitigate, though not eliminate, risks for harm. Trafficking of controlled substances, including contraband alcohol, and contraband tobacco, occurs outside public regulations, thus resulting in high variation in composition, dose, and presence of adulterants.

On an international level, trafficking, as a criminalized activity, is associated with political and economic instability in some countries, may involve money laundering, and trafficking routes may be used to illegally trade in firearms, uncut diamonds, and endangered animals.[665] In Canada, organized crime groups may be involved in drug trafficking (especially cocaine and methamphetamine), financial crimes, human trafficking, fraud, theft, contraband, and counterfeit goods.[666] Street gangs are more likely than organised crime groups to be involved in violent activities that pose a risk to public safety (e.g., shootings), though specific information about the number of incidents and direct connection to trafficking of drugs specifically is lacking.[667] Another group of people involved in trafficking are those who distribute a "minimally commercial supply,"

---

[664] E.g., traffic fatalities associated with driving (World Health Organization, "Road Traffic Injuries," *supra* note 638); hunting accidents [Government of Canada, "Firearms, Accidental Deaths, Suicides and Violent Crime: An Updated Review of the Literature with Special Reference to the Canadian Situation" (29 August 2022) online: ≤https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/wd98_4-dt98_4/p6.html>]; sport or leisure accidents [Charles H Tator, (ed), *Catastrophic Injuries in Sports and Recreation Causes and Prevention: A Canadian Study* (Toronto: University of Toronto Press, 2008)].
[665] Interpol, "Drug Trafficking" (2024) online: <https://www.interpol.int/en/Crimes/Drug-trafficking>
[666]Paul Northcott, "Just the Facts – Organized Crime" (27 April 2021) *Canadian Mounted Police* online: <https://www.rcmp-grc.gc.ca/en/gazette/just-the-facts-organized-crime>
[667] *Ibid*.

which is a term relating to low profit distribution for the purpose of obtaining sufficient amounts of a drug for personal use, usually in relation to a substance use disorder.[668]

Trafficking makes controlled substances available to the public, and thus is implicated to some extent in the potential for harms to arise.[669] A summary of police reported crime in Canada in 2021 reported n=7,692 offences for trafficking of cocaine, n= 2,976 offences for trafficking methamphetamine, n=67 offences for trafficking ecstasy, n=451 offences for trafficking heroin, n=1,806 offence for trafficking opioids other than heroin, and n=5,079 offences for trafficking other types of drugs.[670]

Links between organized crime arising from drug trafficking and societal harms in Canada, such as violence, is not well substantiated in research. This is not to say that such harms are not present, but these claims have not been clearly conveyed. In 2022, there were n=10,588 police-reported organized crime offences in Canada.[671] Among these included n=944 offences for trafficking drugs (other than cannabis) and n=96 offences for importation or exportation of drugs (other than cannabis). The most common offence were fraud (n=4,604), motor vehicle theft (n=1,147), and assault (n=407). There were n=184 homicide offences and n=29 attempted murder/conspire to commit murder offences.[672] No distinction was made whether other offences, such as possession of weapons or homicide, co-occurred with drug-related offences, which means that assertions about the links between organized crime related to drug trafficking and societal harms remain tenuous.[673] To strengthen these arguments, Canadian data can be analyzed in future research to contribute to improved understandings about relationships between drug trafficking, particularly in relation to organized crime, and harm.

---

[668] Ferencz, *supra* note 207, citing Ross Coomber & Leah Moyle, "Beyond Drug Dealing: Developing and Extending the Concept of 'Social Supply' of Illicit Drugs to 'Minimally Commercial Supply'" (2014) 21:2 Drugs: Edu, Prevention & Policy 157.
[669] Similarly, regulated markets for alcohol, tobacco, and cannabis also contribute to access and potential for harm.
[670] Greg Moreau, Canadian Centre for Justice and Community Safety Statistics, "Police-Reported Crime Statistics in Canada, 2021" (3 August 2022) *Statistics Canada*, Juristat at 59. Note: the number of offences for importation, exportation, and production can also be found here.
[671] Statistics Canada, "Police-reported organized crime, by most serious violation, Canada (selected police services)" (27 July 2023) online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510006201>
[672] *Ibid.*
[673] *Ibid.*

Frederick J Desroches interviewed n=70 people convicted with drug trafficking.[674] Among these, n=62 were identified as belonging to drug syndicates between 1990 and 2002. Fifty of the people were classified as living relatively "law-abiding" lives, outside their role in trafficking. They had long histories of employment, were often small business owners, had families, and lived in middle- or upper-class neighbourhoods.[675] Whereas participants reported using intimidation tactics, the majority described themselves as non-violent.[676] Violence was portrayed as harmful to business because it can draw media and police attention, result in retaliation and damage to one's business reputation and relationships, and require high allocation of limited resources.[677] Rhetorical knowledge claims that assert a clear link between drug trafficking and crime may create discursive connections to the gravity of an offence and support arguments for deterrence and denunciation. However, Canadian research provides less definitely support for these claims. In judicial decisions that require blending sentencing principles, consideration of individualized factors regarding the use of violence by the accused and their organization is imperative.

In Canadian law, there has been a shift away from governing morals toward governing harm.[678] However, Mariana Valverde contests that "moving away from 'offence to morals' and toward 'risk of harm' will not necessarily make law more liberal and rational."[679] From this perspective, the notion of harm has is an increasingly significant and influential concept in law. In my thesis, it was not my intention to define harm; rather the intent was to examine how harms are represented in select cases.

The distinction between the harms of drugs and harms of trafficking requires further consideration in Canadian drug law. In many judicial decisions, these notions appear to

---

[674] Frederick J Desroches, *The Crime that Pays: Drug Trafficking and Organized Crime in Canada* (Toronto: Canadian Scholars' Press 2005).
[675] *Ibid* at 44.
[676] *Ibid* at 119.
[677] *Ibid* at 148.
[678] Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at 30 [Valverde]; In this text, Valverde explore the governing of conduct that may be viewed a moral "vice," where a vice is "less than a crime" and "different from a sin," at 16. She comments that "drugs are usually subject to specialized policing," but does not otherwise elaborate, at 15.
[679] *Ibid* at 31.

be conflated, likely because the relative harms attributed to specific drugs impact judges' assessments of gravity and subsequent decisions around sentencing in trafficking cases. Sentencing cases pertaining to the trafficking of fentanyl is one example that was discussed in this thesis. As noted, fentanyl is implicated in a large number of toxicity deaths and this social context of harm may – in some decisions – have a greater impact on the severity of the sentence than the individual circumstances of a specific case.

In general, it appears the harm associated with drugs is often imprecisely defined and sometimes misconstrued. For instance, in *R c Kimmel*,[680] a case pertaining to the trafficking of cannabis, Justice Tardif states "Cannabis is identified with seven scrouges," which are: social scourge, health hazard, scourge in school, scourge in the workplace, production related crimes, crime committee to procure cannabis, and crimes committed under the influence of cannabis. These 'scourges' were purportedly substantiated by select citations to other cases, but without verification of whether these claims were valid and supported by research. The impact of this reasoning on sentencing was not directly stated but appeared to signify gravity and responsibility. Many major authorities, including SCC cases, that determined cannabis to have few harms and medicinal benefits were not cited.

Harm is generally intuited to be based on the classification of the drug according to the *CDSA*, an assumption not substantiated in the literature. When harms are described in judicial decisions, the harms tend to be described as inherent to the drugs, rather than specific to individuals and contexts. However, the majority of people who use illicit substances do so without experiencing significant harm, either with medical supervision or through personally controlled, recreational use.[681] Furthermore, there is often a failure to discern harms that arise from the criminalization of drugs, including the harms that arise from prohibiting distribution of drugs as a commodity.[682]

---

[680] *R c Kimmel,* 2009 QJ No 480, 2009 QCCS 261, EYB 2009-153639.
[681] It is noted by "Among people who use substances, there is a relatively small subset with substance use disorders and high acuity needs" "Health Canada Expert Task Force Report #2", *supra* note 294 at 8.
[682] See Enrique Desmond Arias & Thomas Grisaffi, eds, *Cocaine: From Coca Fields to the Streets* (Durham: Duke University Press, 2021).

Harms of controlled substances are assessed in relation to one another to evaluate harm and severity of sentencing. Such reasoning generally silences consideration of the extensive evidence of harms associated with legally regulated substances like alcohol and tobacco. These silences condone and reinforce the criminalization of controlled substances based on perceptions of severity of harm, when experiences and risks for harm are generally accepted or minimized in relation to legally regulated psychoactive substances. This constructs the potential for drug-related harm as unacceptable and unique to controlled substances, despite harms being tolerated for legalised drugs. An example of effective silencing of such reasoning is seen in *Malmo-Levine*, where the appellants argued that "criminalization of cannabis possession is discriminatory and unfair, in light of Parliament's failure to criminalize the possession and use of alcohol and tobacco."[683] The court found that:

> in light of the state interest in the avoidance of harm to its citizens, the prohibition on marihuana possession is neither arbitrary nor irrational…. Parliament's decision to move in one area of public health and safety without at the same time moving in other areas (e.g., alcohol or tobacco) is not, on that account alone, arbitrary or irrational.[684]

Although psychoactive substances like alcohol, cannabis, tobacco, and pharmaceuticals are legally regulated, they are nevertheless acknowledged in research and law to have varying degrees of harmful effects. Excluding the harms of legal drugs from comparison with controlled substance – based solely on the grounds that they, themselves, are not criminalized – contributes to incomplete and partial understanding of harm and its place in society and, specifically, criminal law. Evidence-informed evaluations of harm can inform critically reflexive decisions about what forms of law are suitable for the regulation of drugs, with the recognition that criminal law is conceptualized a last resort.[685]

The extent to which judges deliberated over the relative harms of fentanyl as compared to other controlled substances when asserting the gravity of the offence - while largely omitting comparisons to alcohol and tobacco – is intriguing. When pressed, judges do not

---

[683] *Malmo-Levine, supra* note 86 at para 91.
[684] *Ibid* at 575-576.
[685] Douglas Husak, "The Criminal Law as Last Resort" (2004) 24:2 Oxford J Legal Stud 207.

consider harms associated with alcohol or tobacco but uphold the right to criminalize drugs as deemed appropriate, regardless of evaluations of harmfulness.[686] This was discussed in 1979 by the judge in *Bengert:*

> Nothing could be as difficult as an attempt to rationalize society's attitudes toward the banning of drugs -- nothing except, perhaps, as to try to explain why people insist on using drugs, even illegal drugs, for non-medical purposes. We tolerate -- indeed, many of our institutions combine to encourage the use of -- alcohol, whose effects on society are well known and by far exceed the damage wrought by any other drug, licit or illicit. But the use of alcohol is entrenched and approved by society. 82 per cent of adult Canadians use alcohol. On the other hand, the use, distribution and sale of cocaine is forbidden for non-medical purposes. Though it is a stimulant, not a narcotic, it is listed in the schedule to the Narcotic Control Act, and as a result those who use it or sell it are subject to the severe penalities [sic] provided in that Act. It is said that this is hypocritical. But it can be justified on the ground that society, recognizing that it is afflicted by one drug, has the right to interdict another drug whose impact might over a period of time create problems of similar proportions.

Discourses of moralization and moral culpability applied to exclusively to individuals who illegally traffic controlled substances that can have negative impacts on health and society largely neglect to consider the government-endorsed, commercialized, profit driven enterprises of alcohol, tobacco, cannabis, and pharmaceutical industries. While I do not endorse illegal commercial trafficking in controlled substances, I do recommend that evaluations of harm not be presented in ways that vilify individuals for financial motives that permeate Western, capitalist societies, *including* branches of the Canadian government that benefit financially from the sales of alcohol, tobacco, and cannabis. *Malmo-Levine* provides a good model for describing harms of a drug.[687] Psychedelics (e.g., MDMA, psilocybin) are following a similar trajectory, with exceptions for medical use.[688] There is said to be a "psychedelics renaissance," a term used to describe a wider public acceptance for therapeutic purposes, spiritual and traditional practice, and personal

---

[686] *Bengert, supra* note 645 at para 19.

[687] As noted in previously, the judges integrate empirical research and expert evidence into their reasoning. It is acknowledged that for most people who use cannabis, the harms are minimal. The judges conclude there are concerns that some populations may be more vulnerable to the pharmacological effects of cannabis and describe the adverse effects. Cannabis is also considered to have therapeutic benefits, so there is a medical rationale for permitting access.

[688] Erika Dyck, "Alberta's new policy on psychedelic drug treatment for mental illness: Will Canada lead the psychedelic renaissance?" (15 January 2023), online: *The Conversation* < https://theconversation.com/albertas-new-policy-on-psychedelic-drug-treatment-for-mental-illness-will-canada-lead-the-psychedelic-renaissance-195061> [perma.cc/4NVK-EA7B].

enhancement. Research indicates that, like cannabis, psychedelics are relatively harmless. MDMA and psilocybin are currently exempted from the *CDSA*, pursuant to subsection 56(1) of the *CDSA* for therapeutic use.[689]

The 1994 World Health Organization Programme on Substance Abuse (WHO/PSA) and the United Nations Interregional Crime and Justice Research Institute (UNICRI) undertook a project called the *Cocaine Project*.[690] In the *Cocaine Project* report, it was explained that adverse health effects are rare and much less severe among people who use cocaine infrequently and in low doses. Adverse effects are more likely among people who use high doses regularly. Negative health consequences are thought to generally be exacerbated by cocaine rather that caused by use. Furthermore, coca leaves specifically serve therapeutic, social, and spiritual purposes and use is harmless to health. According to the study, most people who use cocaine have the financial means to afford it. Although dated, this report is particularly noteworthy, as it was reportedly banned after concerned were raised by a representative of the United States. Notes from the 48th World Assembly captured the controversy:

> The United States Government had been surprised to note that the package seemed to make a case for the positive uses of cocaine, claiming that use of the coca leaf did not lead to noticeable damage to mental or physical health, that the positive health effects of coca leaf chewing might be transferable from traditional settings to other countries and cultures, and that coca production provided financial benefits to

---

[689] Although beyond the scope of this thesis, colleagues and I have argued elsewhere against the medicalization of drugs, which frame acceptability around therapeutic potential. See Niki Kiepek et al, "Seeking Legitimacy for Broad Understandings of Substance Use" (2019) 73 Int J Drug Policy 58 [Kiepek "Seeking Legitimacy"] at 61:

> Medicalisation' refers to social processes that identify aspects of lived experienced as constituting a 'problem' treatable through primarily medical interventions…. Prescribed pharmaceuticals are predominantly framed a positive, necessary, and responsible. Evans-Brown et al. (2012) observe that medicalisation has blurred the line between normal life events and disease, whereby substances are used to alter phenomenon such as ageing processes, social functioning, weight, sexual performance, mood, cognitive functioning, shyness, and tiredness. The availability of substances has redefined health and wellness while causing us "rethink how we view our bodies, how they work, how we can change them and what it means to be human" (Evans-Brown et al., 2012, p.14). By framing illicit substances as exclusively problematic and prescribed pharmaceutical as inherently good, regulatory frameworks are restrictive and non-pharmacological interventions eclipsed. While discussions about legalisation and decriminalisation of cannabis appear to be informed by progressive and alternative perspectives, it is heavily endorsed in relation to therapeutic benefits, rather than individual choice. The discourse around 'medical cannabis' shapes cannabis into a 'medical object,' and overshadows the prevalent use of cannabis for pleasure.

[690] WHO/UNICRI "Cocaine Project" (1995) online: <https://www.tni.org/files/article-downloads/200703081409275046.pdf> [https://perma.cc/J7LK-EKLL].

> peasants… [the United States] took the view that the study on cocaine, evidence of WHO's support for harm-reduction programmes and previous WHO association with organizations that supported the legalization of drugs, indicated that its programme on substance abuse was heading in the wrong direction… The United States Government considered that, if WHO activities relating to drugs failed to reinforce proven drug control approaches, funds for the relevant programmes should be curtailed.[691]

In Canada, as elsewhere, there is little information about personal experiences of cocaine use aside from information garnered in relation to health and legal institutions. However, data from the United States indicates that 14.4 percent of the population 12 years and older had used cocaine in their lifetime; whereas, in 2016, 0.3 percent of the population were identified as meeting the criteria for a cocaine use disorder.[692] Discourses that portray drugs as inherently harmful, without taking into consideration factors like frequency of use, amount of use, underlying predisposition to mental and physical health conditions, financial security, social support networks, intergenerational trauma, and so on, invite conclusions that are not relevant for the majority of the population who use the substance. Such factors may be referred to as social determinants of health or criminogenic factors, which speak to the fact that not all Canadians experience the same degrees of privilege or social capital, resulting in inequitable access to resources, supports, and opportunities or risk for drug-related harm.[693]

As noted in several cases, when used as prescribed by a healthcare professional, fentanyl can be an effective pharmaceutical. However, fentanyl is currently implicated in a large number of drug toxicity deaths.[694] As noted in the judicial decisions, the dangers are exacerbated because the doses are unpredictable and fentanyl is being added to other types of drugs without the knowledge of the person who is buying and perhaps not even by the person selling.[695] If people were able to purchase a regulated product of known

---

[691] World Health Organization, 48th World Assembly, Summary Records and Reports of Committees, Geneva, 1-12 May 1995 WHA48/1995/REC/3 <https://www.tni.org/files/article-downloads/200703081419428216.pdf> [perma.cc/4XUY-TTG6].
[692] Drug Policy Alliance, "Can you Become Addicted to Cocaine after Using it Once?" (2022) online: <https://drugpolicy.org/drug-facts/cocaine/addicted-cocaine-one-use> [perma.cc/5D25-LKAP].
[693] Christopher Kay, "Rethinking Social Capital in the Desistance Process: The 'Artful Dodger' Complex" (2022) 19:5 Eur J Criminology 19 1243.
[694] See Appendix A.
[695] *Chesshire*, *supra* note 581; *Frazer, supra* note 455; *Friesen, supra* note 497; *R v Khan*, 2019 BCJ No 2415 2019 BCPC 300; *R v Malenovic*, 2017 BCJ No 1886, 2017 BCPC 274; *Milne, supra* note 157.

composition and strength, as is available with alcohol and cannabis, or to easily access drug testing resources, such harms would likely be mitigated. In the current context, supplies largely only available through illegal channels.[696]

I draw on an example provided by David Nutt that exemplifies the type of moralizing, crisis driven language embedded in many descriptions of illicit drugs. Among others, he advocates for improved regulation of alcohol, stating "there is no such thing as a safe level of alcohol consumption. Alcohol is a toxin that kills cells and organisms."[697] He voices criticism about distorted messaging perpetuated by the alcohol industry, which markets their products as normal, healthy, and responsible. Drawing on the current propensity to adopt crisis laden framing of drug use, he imagines how alcohol would be described were it a new substance:

> A TERRIFYING new "legal high" has hit our streets. Methylcarbonol, known by the street name "wiz", is a clear liquid that causes cancers, liver problems, and brain disease, and is more toxic than ecstasy and cocaine. Addiction can occur after just one drink, and addicts will go to any lengths to get their next fix – even letting their kids go hungry or beating up their partners to obtain money. Casual users can go into blind RAGES when they're high, and police have reported a huge increase in crime where the drug is being used. Worst of all, drinks companies are adding "wiz" to fizzy drinks and advertising them to kids like they're plain Coca-Cola. Two or three teenagers die from it EVERY WEEK overdosing on a binge, and another TEN from having accidents caused by reckless driving. "Wiz" is a public menace – when will the government think of the children and make this dangerous substance illegal?[698]

In this example, Nutt drew on the same discursive strategies that were evident in many of the cases reviewed in this thesis. There is a crisis-driven urgency grounded on facts around toxicity, risk to a vulnerable segment of society, blaming of suppliers, and an

---

[696] A safe, unadulterated supply of drug contribute to efforts to reduce harm. See Matthew Bonn, et al, "Safe Supply In The Midst of a Crisis of Unregulated Toxic Drug Deaths - A Commentary on Roberts and Humphreys" (2023) 84:4 J Studies Alcohol & Drugs 648; Marilou Gagnon, et al, "Impact of Safer Supply Programs on Injection Practices: Client and Provider Experiences in Ontario, Canada" (2023) 20:1 Harm Reduction J 81; Government of Canada, "Safer supply" (25 April 2023) online: <https://www.canada.ca/en/health-canada/services/opioids/responding-canada-opioid-crisis/safer-supply.html>; Andrew Ivsins, et al, "Tackling the Overdose Crisis: The Role of Safe Supply" (2020) 80 Int J Drug Policy 102769.

[697] Nutt 2020, *supra* note 231 at 126; Alcohol is also a known carcinogen – see e.g., Andrew B Seidenberg et al, "Awareness of Alcohol as a Carcinogen and Support for Alcohol Control Policies" (2022) 62:2 Am J Prev Med 174.

[698] I*bid* at 119.

emphasis on adverse outcomes – with some exaggeration of relative risk – that are generalized to all people who use, such as dependence liability, harm to families, and crime. Another similarity is the comparison of this substance to others that are typically viewed in society as extremely harmful. His description is not inaccurate, but it is it incomplete, conveys very little nuance, and highlights the inconsistent ways that controlled drugs – purported to be concerned about harm – are regulated.

While on one hand, this type of discourse can be persuasive and conveys a type of urgency toward action and intervention. On the other hand, the actions and interventions may fail to effect what are portrayed as desired changes. When articulating their rationale for sentencing, many judges drew on dramatic crisis-based framings of substance use and trafficking, which convey gravity and the need for harsh sentences. This contrasts with the position of the Public Prosecution Service of Canada that criminal sanctions have limited effectiveness to effect specific or general deterrence or protect public safety.[699] Over the past five decades, research indicates that severity of sentences is unrelated to general deterrence.[700] A systematic review found that certainty of a penalty was more likely to act as a deterrence than the severity of a sentence.[701] However, the deterrent effect was more likely to be "restrictive deterrence," which refers to strategies to avoid detection (e.g., counter-reconnaissance, innovative concealment, cooperating with police) as opposed to "absolute deterrence," which refers to refraining from engaging in the conduct.[702] Severity of penalties may have a deterrent effect on the type of drug a person traffics.[703] It was furthermore observed that framings of crisis can misdirect attention from the factors underlying the situation.

---

[699] Public Prosecution Services of Canada, "5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act" (17 August 17, 2020), online: *Public Prosecution Service of Canada Deskbook* < https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html> [perma.cc/XVW7-MMMQ]. It is specifically stated, "Criminal sanctions, as a primary response, have a limited effectiveness as (i) specific or general deterrents and (ii) as a means of addressing the public safety concerns when considering the harmful effects of criminal records and short periods of incarceration" at para 5.
[700] Doob, *supra* note 106; Lauren Wilson & Rachel Boratto. "Conservation, Wildlife Crime, and Tough-on-Crime Policies: Lessons from the Criminological Literature" (2020) 251 Bio Conserv 108810.
[701] Xin Guan & T Wing Lo, "Restrictive Deterrence in Drug Offenses: A Systematic Review and Meta-Synthesis of Mixed Studies" (2021) 12 Frontiers Psych 727142.
[702] *Ibid*.
[703] *Ibid*.

While framing social issues as a crisis can draw attention to heightened severity and risk for harm, this label is also problematic and limits understanding. Colleagues and I have previously written about the ways in which framing drug use as a crisis has constrained the breadth of research that would explore nuanced experiences of substance use.[704] Researchers are implicitly and explicitly influenced to focus research on problematic aspects of substance use, with funding more available for a public health crisis, more journals with a scope that focuses on publishing problematized notions of substance use,[705] and risk to professional reputation for research that does not conform to dominant conceptualizations. Although alternative perspectives are receiving increased legitimacy, these remain outside mainstream discourses, including law.

The term crisis can be problematic when it comes to understanding a phenomenon. Efrat Arbel argued that Canadian discourse that frames incarceration of Indigenous people as a "crisis" is not only 'ill suited to address the problem, but is part of the problem."[706] Arbel asserts that use of the term 'crisis' is a misnomer. For example, whereas a crisis is transient and unique, the mass incarceration of Indigenous people is neither.[707] Arbel elaborates:

> Unlike crisis, Indigenous mass imprisonment is neither anomalous nor transitory. Rather, like colonialism itself, it is entrenched in the fabric of the Canadian legal system. There is nothing extraordinary about the steadily rising rates of Indigenous incarceration; they are as predictable and fixed as the colonial structures that produce them. As deployed, the language of "crisis" obscures this fact. By presenting Indigenous mass imprisonment as atypical, this language makes it more difficult to recognize Indigenous mass imprisonment *as* colonial violence.[708]

---

[704] Kiepek "Seeking Legitimacy", *supra* note 689.
[705] Exceptions include: *Contemporary Drug Problems; Alcohol and Drugs Today International Journal on Drug Policy.*
[706] Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 Can JL Soc 437 [*Arbel*].
[707] There is increased contention that social issues may be discursively framed a crisis when the underlying causes of the problem are systemic, e.g., Kieran Morgan, David Prothero & Stephen Frankel, "The Rise in Emergency Admissions—Crisis or Artefact? Temporal Analysis of Health Services Data." (1999) 319:7203 BMJ 158. The framing of issues as a crisis impacts how problems become constructed, form justification for responses or interventions, "identify villains or victims," and foster collaborations or partnerships, among other outcomes, as described in Iain White & Gauri Nandedkar, "The Housing Crisis as an Ideological Artefact: Analysing How Political Discourse Defines, Diagnoses, and Responds" (2021) 36:2 213 Housing Studies at 216.
[708] Arbel*, supra* note 706 at 438.

Continually framing a social issue as a crisis dulls the severity, normalizes the phenomenon, and functions as a "substitute for action."[709] While fentanyl is a primary substance of concern in Canada today, similar framings of devastating effects have been seen historically in relation to other substances.

Arbel also argues that enacting a legal response to a crisis through sentencing "does little to challenge the operation of Indigenous mass imprisonment or disrupt its ordering."[710] Whereas colonial structures are implicated in creating the social disparities that contribute to disproportionate imprisonment, attempting to respond to social inequities in sentencing fails to disrupt underlying factors. This relates to the legal system itself, says Arbel: "At the very moment they assign responsibility to the Canadian legal system for the production of 'crisis,' *Gladue* and *Ipeelee* proliferate irresponsibility by turning to that same system to overcome the conditions it has created and continues to enforce."[711]

Matthew Bonn, et al, raise concerns that the criminalized status of drugs in Canada increases risks of overdose and overdose deaths, increases risks for acquiring blood-borne infections, and reduces the likelihood of voluntary access to health and social services.[712] In the absence of a safe, regulated supply, people who use drugs are exposed to adulterated and potentially toxic supplies, obtained at inflated costs, through criminal channels.

When considering the level of applicability of these ideas to judicial decisions, it can be noted that judges necessarily try cases brought to them and the evidence presented. Although context has been mentioned in many cases (e.g., increased social acceptance of cannabis; opioid crisis), broader social and institutional factors that impact substance use and trafficking are only addressed to determine whether there are individual exceptional circumstances. Factors that contribute to population-level marginalization, stigmatization,

---

[709] *Ibid* at 451.
[710] *Ibid* at 439.
[711] *Ibid* at 454.
[712] Matthew Bonn, et al, "Addressing the Syndemic of HIV, Hepatitis C, Overdose, and COVID-19 Among People Who Use Drugs: The Potential Roles for Decriminalization and Safe Supply" (2020) 81:5 J Studies on Alcohol & Drugs 556.

and discrimination that result in disproportionate involvement in drug use and trafficking are largely absent, reifying notions of crime as purely an individual choice.

In Canada, lack of timely access to culturally appropriate mental health and addiction services is an ongoing barrier to rehabilitation.[713] Instances of stigmatization and marginalization reported by substance-involved people when attempting to access health and social services results in disengagement, distrust, and poorer outcomes.[714] Whereas many community programs offer harm reduction services, such as needle distribution programs, safe injection sites, and managed alcohol programs, they are not universally available.[715] Hospitals generally lack harm reduction policies and substance-involved patients report poor treatment, inadequate pain management, and lack of compassionate care.[716] Many Canadians engage in the informal economy, including panhandling, bottle collecting, and drug distribution,[717] as Canada's social benefits are insufficient to support a living wage and there is a lack of affordable housing.[718] These types of inequities experienced among Canadians contribute to disproportionate challenges associated with drugs and infringes on opportunities for rehabilitation.

Mindful of these complications, it is inappropriate to rely on prisons as an acceptable alternative setting for the principal purpose of providing access health resources.[719] This is to say that although many of the judges' concerns about drug-related harm are fairly

---

[713] Julie Lauzière, Christopher Fletcher & Isabelle Gaboury, "Factors Influencing the Provision of Care for Inuit in a Mainstream Residential Addiction Rehabilitation Centre in Southern Canada, An Instrumental Case Study into Cultural Safety" (2021) 16:1 Substance Abuse Treatment, Prevention & Policy 1; L. Jackson, H. "Accessing Drug Treatment Programs in Atlantic Canada: The Experiences of People Who Use Substances" (2022) [ahead of print] Drugs: Education, Prevention and Policy 1.
[714] Ryan McNeil et al, "Hospitals as a 'Risk Environment': An Ethno-Epidemiological Study of Voluntary and Involuntary Discharge from Hospital against Medical Advice among People Who Inject Drugs" (2014) 105 Soc Sci & Med 59.
[715] See e.g., Cayley Russell et al, "Opioid Agonist Treatment Take-Home Doses ('Carries'): Are Current Guidelines Resulting in Low Treatment Coverage Among High-Risk Populations in Canada and the USA?" (2022) 19:1 Harm Reduction J 1; Wild, T Cameron, "Canadian Harm Reduction Policies: A Comparative Content Analysis of Provincial and Territorial Documents, 2000–2015" (2017) 45 Intl J Drug Policy 9.
[716] Niki Kiepek et al, "Exploring Care of Hospital Inpatients with Substance Involvement" (2021) 281 Soc Sci & Med 114071.
[717] Homeless Hub, "Informal Economy" (2021), online: <https://www.homelesshub.ca/about-homelessness/education-training-employment/informal-economy> [perma.cc/AD38-XMYC].
[718] Bryan Evans, Carlo Fanelli & Tom McDowell, eds, *Rising Up: The Fight for Living Wage Work in Canada* (Vancouver: University of British Columbia Press, 2021).
[719] Eilish Scallan, Kari Lancaster & Fiona Kouyoumdjian, "The 'Problem' of Health: An Analysis of Health Care Provision in Canada's Federal Prisons" (1997) 25:1 Health 3.

stated, attributing harm solely or primarily to the drug demonstrates an incomplete understanding the roles of the societal context and systems in creating and perpetuating the potential for such harms to manifest. Given the legitimacy and authority of judicial discourse, these misrepresentations and partial understandings become more firmly entrenched in social and political discourses.

When considering moral culpability in sentencing, the aim is to hold individuals responsible for choices that are in some way viewed as detrimental to society. Yet, choices are shaped by factors like access to resources and services. A genuine choice to engage in available services is influenced by how one is treated – with kindness or with derision. When considering mitigating circumstances, judges consider whether the accused has accessed addiction treatment services, whether they reduced or quit substance use, and whether they secured employment. In the decisions I reviewed, I did not see consideration of systems level mitigating factors that acknowledge instances of insufficient and inadequate access to culturally appropriate, trauma-informed, non-stigmatizing services.[720] Two cases considered IRCA[721] and twelve considered *Gladue*[722] as part of sentencing. Outside evolving requirements to judicially consider systemic factors as pertain to *Gladue* and IRCAs, there was little to no parallel acknowledgement of the potential for systemic discrimination related to factors such as poverty, homelessness, mental health, education, or of barriers to secure housing, obtaining employment, or engaging in other types of socially desirable activities that might be interpreted by judges as evidence of rehabilitation or be considered as mitigation factors.[723] *Ellis* does include some details around the "social context," which can be used

[720] These considerations are being discussed in government settings. See e.g. "Health Canada Expert Task Force Report #1", *supra* note 294; Sheena Taha, Bridget Maloney-Hall & Jane Buxton, "Lessons Learned from the Opioid Crisis Across the Pillars of the Canadian Drugs and Substances Strategy" (2019) 14:1 Substance Abuse Treatment, Prevention & Policy 32.
[721] *Simmonds, supra* note 429*; White, supra* note 138.
[722] *Agecoutay, supra* note 433*; Campbell, supra* note 576*; Etmanskie, supra* note 446*; R v Fitzpatrick,* 2017 BCJ No 2192, 2017 BCPC 319*; R v JS,* 2018 NJ No 290*; Mitchell, supra* note 150*; R v Oduro,* 2022 OJ No 954, 2022 ONSC 530 [*Oduro*] (used to consider anti-Black racism)*; Parranto, supra* note 125*; Rider, supra* note 443*; Shallow, supra* note 111*; Simmonds, supra* note 429*; R c Traux 2021,* ABCA 97.
[723] Isolde Daiski, "Perspectives of Homeless People on Their Health and Health Needs Priorities" (2007) 58:3 J Adv Nursing 273; Anna Skosireva et al, "Different Faces of Discrimination: Perceived Discrimination Among Homeless Adults with Mental Illness in Healthcare Settings" (2014) 14:1 BMC Health Serv Research 376.

to determine the "rehabilitative prospects of the offender."[724] The broader social context impacts what services are even available to promote health, wellbeing, and engagement in more socially valued activities. It is important to understand the rehabilitative prospects of a person are *not* contingent solely on the person so that not being able to access appropriate services should not be an aggravating factor.

Haley Hrymak contends that contrary to espoused goals of Section 718 of the *Criminal Code* as "maintenance of a just, peaceful and safe society,"[725] the current courts' response to the opioid crisis largely "exacerbates the present risks to people who use drugs and puts a vulnerable population at an increased risk of harm."[726] She argues, "The imposition of lengthier prison sentences [in British Columbia] will not promote public safety and ignores the fact that most street-level traffickers are substance users themselves."[727] Proponents of decriminalization tend to promote a shift from criminalization toward public health and human rights approaches, which acknowledge that problems associated with drugs arise from "social, historical, and political systemic forces (including colonisation, social inequity, and racism) and inadequate policies (such as criminalization of simple possession, an extremely toxic unregulated illegal drug market, and inadequate regulation of alcohol) [which are] are the fundamental drivers behind toxicity deaths and many other substance use harms."[728]

In my estimation, aspirations of improved health and wellbeing for those most negatively impacted by drug use cannot succeed if concerted efforts are not made to improve health and social services in Canada, both in terms of availability and quality. To enhance access to non-stigmatizing health and social services, organizations and institutions can develop harm reduction policies and train their staff on how to effectively enact the principles. Education of professionals in health, social, and law enforcement fields can include information about non-stigmatizing approaches, social influences on health and conduct, and systemic inequities. Government funded social income needs to be

[724] *Ellis, supra* note 44 at para 76.
[725] *Criminal Code*, RSC 1985, c C-46, s 718.1.
[726] Hrymak, *supra* note 106 at 149.
[727] *Ibid* at 150.
[728] "Health Canada Expert Task Force Report #2", *supra* note 294 at 4.

responsive to increases in the minimum living wage.[729] Furthermore, there needs to be increased safety around drugs, which can include a safe supply.[730] The high death rate related to fentanyl (or analogues like carfentanil) toxicity does not arise solely from the pharmacological properties of the drug itself. Rather, the doses are unpredictable and fentanyl is used to adulterate other drugs used by unsuspecting customers.[731] These risks are a product of the illicit market, which is inherently less safe than one that is regulated and has quality control measures in place.[732] Although it is not under the purview of the judicial system to dictate the practices of education, health, and other social policies and programs, they can demonstrate awareness of non-stigmatizing approaches and non-stigmatizing discursive constructions of drugs. Judges can acknowledge these types of contextual factors and influence and shape how drugs and people who use drugs are understood and talked about.

It should not be expected that improvements associated with decriminalization (as being implemented in British Columbia) will be immediate.[733] More immediate outcomes of decriminalization will be reduced use of certain legal resources (e.g., reduced days of incarceration) and fewer people acquiring a criminal record. To enhance positive individual and societal outcomes, more needs to be done. Provinces, health organizations,

---

[729] Homeless Hub, "Government Benefits" (2021), online: <https://www.homelesshub.ca/about-homelessness/education-training-employment/government-benefits> [perma.cc/FY5Q-XWEA].
[730] "Health Canada Expert Task Force Report #2", *supra* note 294.
[731] D E Payer et al, "Adulterants, Contaminants and Co-occurring Substances in Drugs on the Illegal Market in Canada an Analysis of Data from Drug Seizures, Drug Checking and Urine Toxicology" (April 2020), online: *Canadian Centre on Substance Use and Addiction* <https://www.ccsa.ca/sites/default/files/2020-04/CCSA-CCENDU-Adulterants-Contaminants-Co-occurring-Substances-in-Drugs-Canada-Report-2020-en.pdf> [perma.cc/W4M5-VRDD].
[732] One potential harm reduction strategy involves engaging people who traffic drugs in drug testing initiatives, so they can more accurately inform consumers about the product and mitigate risk. Geoff Bardwell, et al, "Trusting the Source: The Potential Role of Drug Dealers in Reducing Drug-Related Harms via Drug Checking" (2019) 198 *Drug & Alcohol Dependence* 1.
[733] Concerns remain that the quantity of drugs permitted are too low and decriminalization does not respond to the "toxic street drug supply" that is currently contributing to the high rate of toxicity death, as reported in Jon Hernandez, "Why One Researcher Dubs Drug Decriminalization in B.C. an 'Exciting', if Flawed, Experiment" (1 February 2023) online: *CBC News* <https://www.cbc.ca/news/canada/british-columbia/researcher-dubs-drug-decriminalization-bc-exciting-flawed-experiment-1.6731264> [perma.cc/D92S-MBG3]; Other concerned raised include the lack of attention to underlying systemic factors that contribute to problematic substance use and a lack of access to addiction treatment services, as reported in Simon Little, "First Step or Misstep? Mixed Reaction to B.C. Drug Decriminalization" (31 January 2023), online: *Global News* <https://globalnews.ca/news/9446710/bc-decriminalization-pilot-start-reaction/> [perma.cc/7GCH-GGS5].

and social services can develop harm reduction policies. Hospital accreditation can include criteria around improving access for and retention of substance-involved patients. Health professional education curricula can include topics around engaging substance-involved persons in compassionate, respectful, culturally safe care. Organizations can implement codes of conduct to hold staff accountable for the provision of non-stigmatizing, equitable services. When judges and legal scholars review the impact of judicial decisions on desired outcome, like rehabilitation, critical reflection is required to understand what types of outcomes are realistic and to consider the amount of time needed to see evidence of improvements.

To conclude this section, I cite Mariana Valverde, who said, "There are harms and there are harms, and there are victims and there are victims; even more important, the purported victims do not seem, generally to have any say in the discovery and evaluation of the harms they are thought to suffer."[734] To enhance knowledge about lived experiences of harm (arising variably from drug use, judicial processes, and the law), it is imperative to genuinely involve citizens who are directly impacted.[735]

It is increasingly evident that harms need to be considered in the courts *beyond* the effects of drugs on individuals and society toward the harm of drug laws. Experiences with

---

[734] Valverde, *supra* note 678 at 42.

[735] People with lived experience are increasingly engaged as research partners, including research about substance use. See e.g., Bernadette Pauly et al, "Applicability of a National Strategy for Patient-Oriented Research to People Who Use(d) Substances: A Canadian Experience" (2022) 8:1 Research Involvement & Engagement 22; Emilie Comeau, et al. "'More of the Same, but Worse than before': A Qualitative Study of the Challenges Encountered by People Who Use Drugs in Nova Scotia, Canada during COVID-19" (2023) 18:3 PloS e0283979. This research can be used by lawyers and judges in evidence-base law practices. In *Ellis* the Vancouver Area Network of Drug Users (VANDU) were granted leave to intervene and the judge (at para 56) explains VANDU submitted:

> in the context of the current opioid crisis, non-carceral sentences should "regularly be available for street-level fentanyl traffickers" who traffic to support their own drug use. VANDU says the principle of denunciation should not apply to these offenders, whose moral blameworthiness is diminished. From VANDU's perspective, "[h]arshly punishing these individuals for a crisis that claims them as its victims is perverse". VANDU further submits that street-level traffickers often have "little to no choice" between selling fentanyl and different drugs, because fentanyl is now found in nearly all drugs. As such, the intention in Smith to impose a higher sentencing range for fentanyl as opposed to other drugs should be reconsidered in light of this "material change in the surrounding circumstances."

In this manner, the voice of people with lived experiences of drug use was included to inform a sentencing decision.

Gladue, *Ipelee*, and the establishment of IRCA reports in sentencing decisions indicate that the courts can and do attempt to address aspects of societal problems through the application of criminal penalties. The imperativeness of recognizing systemic factors that contribute to creating a criminalized population was not a legislated requirement; it arose through decisions and interpretation by judges. To date, judges have largely upheld laws that disproportionately impact some people and not others depending on whether the drug is legalized or criminalized, irrespective of relative risk for harm. Yet, at the same time, judges espouse the harms of drugs as central factors to determinations of gravity and to reinforce the need for denunciation and deterrence. These are contradictions that need to be acknowledged and addressed; one place this can occur is in judicial decisions.

4.2.2 Refrain from Moralization and Stigma in Judicial Decisions

Despite the temporary decriminalization of small amounts of controlled substances for personal use in British Columbia, many Canadians will continue to face criminal charges related to the possession and distribution of drugs. My research has uncovered an immediate concern around institutionalized stigma embedded in judicial decisions that relate to a heavy reliance on judicial tropes and insufficient integration of evidence-informed law.

The United Nations Office on Drugs and Crime declared, "Stigma is an enormous challenge in the field of psychoactive substances, including controlled substances."[736] At the 61st session of the *Commission on Narcotic Drugs*, the Government of Canada tabled resolution 61/11, entitled, "Promoting non-stigmatizing attitudes to ensure the availability of, access to and delivery of health, care and social services for drug users.[737]" It is reported that delegates discussed topics about the education of health professionals and other service providers about stigma, "careful and appropriate understanding of the scientific evidence," "changing language around substance use and substance use

[736] United Nations Office on Drugs and Crime, "Inclusion, not exclusion: UNODC addresses stigma around substance use" (nd), online: <https://www.unodc.org/unodc/en/frontpage/2020/January/inclusion--not-exclusion_-unodc-addresses-stigma-around-substance-use.html>
[737] *Ibid* at para 4.

disorders," and meaningful involvement people with lived and living experiences in the development of policies and services, and advocacy.[738] My findings echo calls of the Canadian Government to promote human rights. In this section, I discuss opportunities to mitigate stigma by, in part, attending to how it has become embedded in the language used in judicial decisions.

In the introduction, I presented literature about the "normative, value-laden quality of judging."[739] It is purported, "There are few areas of law that grant judges as much discretion as the sentencing of criminal offenders. This discretion necessarily leads to concerns about the influence of biases, including those that result from subconscious processes."[740] Research indicates that sentencing decisions are influenced by factors such as the political ideology and personal beliefs of the judge, which are often covert and without awareness.[741] Rachel J. Cahill-O'Callaghan observes, "although the law provides the basis for framing and constraining judicial discretion, in difficult cases at least, it is the personal values of an individual judge that influences how that judicial discretion is exercised and that, in turn, can influence the way in which the law develops."[742]

Judges are in privileged positions of authority and their opinions are afforded a great degree of legitimacy. The legitimacy they hold means that their decisions directly impact people's lives. In part, this is through the sentences they impose being carried out, but their legitimacy extends more broadly to discursive authority. What a judge *says* is often persuasive, influencing how people think and subsequently how they act. When scrutinized, it can be understood that language "betrays and bolsters the oppressive ways of thinking about and responding to" particular aspects of lived experience.[743] At the same time, it holds the potential to be progressive, protective, and emancipatory.

---

[738] *Ibid* at para 6.
[739] Bernstein, *supra* note 21 at 27.
[740] Craig E Jones & Micah B Rankin, "Justice as a Rounding Error - Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada" (2014) 52:1 Osgoode Hall LJ 109.
[741] Cahill-O'Callaghan, Rachel J, "The Influence of Personal Values on Legal Judgments" (2013) 40:4 JL & Soc'y 596.
[742] *Ibid* at 620.
[743] Sullivan, *supra* 396 at 413.

It is claimed, "language is not 'a neutral instrument of purposes peculiar to the internal development of legal regulation and legal discipline' but a semantic system that is constituted by and thus inseparable from social and historical norms and values."[744] In this thesis, I uncovered the inclusion of highly moralizing, value-laden language, which can be understood as stigmatizing. This is distinct from the notion that "from a sentencing perspective, all criminal offences evolve from real stigma,"[745] emerging from social evaluations pertaining to a person being accused (and potentially found guilty) of having committed a crime. [746] Rather, the stigma discussed here derives specifically from language used in judicial decisions.

Erving Goffman defined stigmatization as reducing an individual "in our minds from a whole and usual person to a tainted, discounted one."[747] George Ferns and colleagues identified two discursive practices of stigmatization they referred to as "establishing ingroup morality."[748] First, through language, one group (the ingroup) emphasizes their moral position by adopting "an analogical practices of 'virtue transfer (accentuating ingroup morality) and 'affective association' (generating emotions to motivate stigmatization)."[749] In my analysis, I demonstrated numerous instances of language that served to predominantly position people who use drugs as vulnerable members of society and victims and those who distribute drugs (in ways that contravene laws) as immoral predators. Words with strong affective associations were used that motivate negative judgment towards the accused and the crimes they are said to have committed. The second strategy is to "amplifying outgroup deviance."[750] This involves using language in

---

[744] Goodrich 1987 at 1, as cited by Mitchell, "Analyzing the law Qualitatively", *supra* note 19 at 107.
[745] Ruby, *supra* note 243 at 311.
[746] This perspective was expressed in *R v DESM* (BCCA), [1993] BCJ No 702 at section 20:

> By convicting him, society has already stigmatized him as a person who has committed a serious offence, and has denounced his offence. Quite recently, the Supreme Court of Canada has expressed itself quite strongly on the importance of stigma as a consequence of criminal proceedings. The Court has been saying what most lawyers and criminologists have known all along, that a public charge, trial and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct.

[747] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (London: Penguin Books, 1963) at 3.
[748] George Ferns, Aliette Lambert & Maik Gunther, "The Analogical Construction of Stigma as a Moral Dualism: The Case of the Fossil Fuel Divestment Movement" (2022) 65:4 Academy Mngt J 1383.
[749] *Ibid* at 391.
[750] *Ibid*.

ways that reinforce negative traits of the outgroups, encouraging perspectives of ostracization and highlighting fundamental flaws.[751] Types of stigmatizing and fear mongering messages about drugs commonplace in the War on Drugs era and those arising from moral panic tend to be counteractive. Mass media drug scares continue today with fentanyl described as a "weapon of mass destruction" or "instrument of death," and responsible for "destroying families from coast to coast."[752] When fear mongering rhetoric becomes dominant, the public has less access to accurate information, public health messages portray drugs in ways that often do not align with people's personal experiences with those drugs, and stigmas are perpetuated. A further consequence is that "the substance and its users … become convenient scapegoats for much more complex social problems,"(such as poverty, racism, class, as discussed in the previous section.[753]

As described in the findings, there was high incidence of moralization language that have become entrenched and normalized through repeated citation and reproduction. This, I suggest, can be interpreted as *institutionalized stigmatization*.[754] In the construction of drug-related harm, it would appear that ideology and personal opinions influence the way that judicial decisions are written. Subtle selection of words and tropes results in judicial decisions that cannot be interpreted as purely impartial.

Sarah Ferencz advocates,

> Lawyers ought to recognize their role in advancing strategic arguments that can either perpetuate stigma or challenge longstanding stereotypes, thereby creating new ideas in legal discourse about people who use and supply drugs that are rooted in harm reduction and the autonomy of people who use drugs.[755]

This holds true for judges as well. As discussed earlier, the use of moralization language inhibits understandings about the accused, associated harms, and the context. In my

---

[751] *Ibid.*
[752] Kennedy, *supra* note 512 at 612.
[753] *Ibid*.
[754] The concept of institutional, or structural, stigma refers to "the rules, policies, and procedures of private and public entities in positions of power that restrict the rights and opportunities of people with mental illness" and occurs when "differentials in power and status are legitimated, and disadvantage and social exclusion are perpetuated," as described by James D Livingston & Jennifer E Boyd, "Correlates and Consequences of Internalized Stigma for People Living with Mental Illness: A Systematic Review and Meta-Analysis" (2010) 71:12 Soc Sci & Med 2150.
[755] Ferencz, *supra* note 207 at 229.

opinion, avoiding the use of moralized, stigmatizing language will improve the clarity and accuracy of the facts presented, where the quality of the argument is not contingent on the use of moralization language. One advantage of refraining from using moralization language is that judges must clearly construct their argument in precise ways that focus on the person, the charges, and the context, while avoiding reliance on tropes that pose the risk of reifying stigmatized perspectives. A second advantage is to reduce the presence of stigma in the judicial and, further, in the corrections systems.

As I mentioned in the introduction, it is somewhat outside the purview of this this thesis to analyze whether the judicial decisions were 'just and appropriate.' Regardless of the judicial decision, there is nevertheless a potential that stigmatizing language may reflect personal biases that could indeed influencing sentencing decisions. Monique Mann et al. conducted a critical discourse analysis about the ways in which gendered discourses were apparent in sentencing of women involved in drug offences related to the manufacturing of methamphetamine.[756] Research indicates that drug offences are typically viewed as a 'masculine crime.'[757] Women who engage in 'masculine' crimes tend to receive harsher treatment and longer custodial sentences.[758] The findings of my research reveal a reliance on highly moralization language, alongside a dearth of empirical evidence, which appears to heighten perceptions of high gravity and moral culpability and serve as a rationale for heavy sentences. The findings suggest the question of a link between moralization language and severity of sentencing for drug offences warrants worth further investigation.

Lawyers and judges should increase their awareness about the potential for their use of language to reinforce and create stigma. Most instances of moralization language involves citation of past cases, as can be seen in Tables 2-5. In many instances, past cases were cited *solely* for details that included moralization language about drugs, addiction, and/or trafficking, not for their analysis of legal principle or reference to past sentences. An intriguing question remains as to the reliance on citations for the introduction of

[756] Monique Mann et al, "There is 'Hope For You Yet': The Female Drug Offender in Sentencing Discourse" (2014) 47:3 Aus NZ J Crim 355.
[757] *Ibid.*
[758] *Ibid.*

moralization language into sentencing discourse. It simultaneously creates a perception of legitimacy, as citing past legal sources increases credibility, while distancing the speaker from having actually produced the stigmatizing language.

Certainly, the principle of *stare decisis* obligates judges to stand by previous decisions unless they can identify and articulate a reason to overturn a decision or factors that differentiate the cases.[759] Thus, it is standard practice for judges to cite past cases as sources for their judicial reasoning to demonstrate the legitimacy and credibility of their decision. A problem that arises, as demonstrated by my thesis, is when credibility about *knowledge* is *assumed* based solely on citation of a judicial decision. More troubling, is the assumed legitimacy and credibility afforded to stigmatized representations of people and criminalized conduct. Rarely, in my analysis, was there an instance of stigmatizing language that appeared to *originate* from the judge delivering the sentence or the lawyer introducing evidence; however, once it appears, it cited frequently. This practice is partially a means of distancing oneself from being viewed as personally biased, while nevertheless allowing such stigmatized perspectives to inform the rationale for the decision. Introduction of moralization language and stigmatization lends weight to judicial tropes, which may exacerbate perceptions of harm and obscures the need to draw on empirical research for accurate evidence that can substantiate knowledge claims.

In my findings, I noted that *Smith* was a frequently cited source of moralization language. It has been observed by legal scholars that "*Smith* helped establish a pattern of overly punitive sentences imposed on street-level dealers who are often people who use drugs themselves who are selling drugs to support their own addictions."[760]

There are excellent examples of cases that do not include moralization language or use of judicial tropes, such as *McWhirter*,[761] pertaining to trafficking in cocaine and possession of cocaine for the purposes of trafficking that resulted in a sentence of 15-month incarceration, and *Wall,*[762] dealing with cannabis and cocaine that resulted in a suspended

[759] Malcolm Rowe & Leanna Katz, "A Practical Guide to *Stare Decisis*" 2020 *Windsor Rev of Leg & Soc Issues* 41 WRLSI 1.
[760] Ferencz, *supra* note 207 at 228.
[761] *McWhirter*, 2018 BCSC 2239.
[762] *R v Wall,* 2018 BCJ No 3250, 2018 BCSC 1643.

sentence. *Maruska,* related to phenyl cyclohexyl piperidine (PCP) that resulted in sentencing four men to incarceration for periods that ranged from 8 to 16 years.[763] This case exemplifies appropriate use of empirical research, using predominantly non-moralizing and non-stigmatizing language.[764] *Murphy*[765] upheld an appeal from the Crown where the decision of the sentencing judge was a suspended sentence for the unauthorized distribution and sale of cannabis under the *Cannabis Act*. The judge cited previous cases for legal interpretation only and to discursively construct harm. *Clay*[766] and *Malmo-Levine* are examples of SCC cases that effectively draw on empirical research, cite cases with the purpose of informing judicial interpretation, and refrain from moralization language.

The Government of Canada has identified a need to reduce "substance-related stigma in Canada's correction systems" through education and adoption of non-stigmatizing language.[767] Frankie Sullivan[768] undertook a CDA study that undercovered certain ways in which use of language by judges can function to not only denigrate people with disability, but also condones violent crimes against this population. The impacts of our use of language extend beyond the outcomes of what is said (e.g., a person being incarcerated because a judge articulates this sentence in context of a hearing) to the longer term implications of how language constitutes knowing and being (e.g., constructing people who use controlled substances as victims and villains). When the public is exposed to judicial discourses that demonstrate disrespect and marginalization, this can reify social stigma and legitimize inequitable treatment of some citizens. Certain members of society are de-valued and de-humanized.

Identifying stigma evident within institutional processes provides an opportunity to critically reflect on the institutional culture in which such practices arise. Transformation

---

[763] *Maruska*, *supra* note 582.
[764] Note that the term "addict" is used in this 1981 case, which although remaining a fairly common term, is increasingly understood a stigmatizing (as described in the thesis Introduction).
[765] *Murphy*, *supra* note 430.
[766] *Clay, supra* note 582.
[767] Government of Canada, "Federal Actions on Opioids to Date*"* (2023), online: <https://www.canada.ca/content/dam/hc-sc/images/services/opioids/federal-actions/overview/overview.jpg>
[768] Sullivan, *supra* note 396 at 413.

requires systems level reform. While individuals may be encouraged to alter certain approaches, identifying instances of institutionalized stigma is not a matter of attributing individual blame. It is through processes of normalization that stigma becomes entrenched, condoned, and accepted, and thus perhaps unintentionally adopted as a standard approach.

Although criminal cases necessarily pertain to individual conduct, all conduct occurs in social contexts. The illicit substances simpliciter is not inherently harmful and immoral – even fentanyl is used in beneficial ways. However, certain factors make it more likely to have a disproportionate negative impact on some members of society.

In section 1.2.1.2, the influence of individual values and ideology were discussed inherent to socially embedded practices, which includes judicial decisions. In this thesis, I uncovered evidence of moralization language, as well as evidence of its absence. Use of moralization language can be understood in relation to Bosmajian's work on the "language of oppression"; namely, "the inhumane uses of language, the 'silly words and expressions' which have been used to justify the unjustifiable, to make palatable the unpalatable, to make reasonable the unreasonable."[769] It is beyond the scope of this thesis to analyze, with greater precision, the potential relationship of the presence of moralization language, the personal or political values of individual judges, and the direct impact on sentencing or interpretation of legal theory; however, findings suggest a possible correlation that warrants further research. A minimum, such instances of moralization language should inspire critical reflection on the validity of knowledge claims predicated on discursive rhetoric rather than reliable sources of evidence.

Findings of this thesis lends further support to the insight that sentencing and the production of judicial decisions are not value-neutral practices. To engage in anti-

[769] Haig A Bosmajian, *The Language of Oppression* (Washington: Public Affairs Press, 1974) at 9; For instance, he claims, "As long as adult women are 'chicks, 'girls,' 'dolls,' 'babes,' and 'ladies,' their status in society will remain 'inferior': they will go on being treated as subjects in the subject-master relationship as long as the language of the law places them into the same class as children, minors, and the insane" at 9. It is worth noting that much progress has been made in areas of mental health and disability, rendering such comparisons to 'the insane' inaccurate and inappropriate in contemporary times.

oppressive legal practices, judges may engage in critical reflexivity. For instances, judges may ask themselves questions like:

- How does my use of language in judicial decisions constitute law, people, and conduct in particular ways? Do I convey respect to others in my use of verbal and written language? Do I use language in ways that might demean, stigmatize, or oppress others? Do I silence people or perspectives that differ from my own or that do not serve my immediate agenda? What underlying messages would I like to convey through my communications?
- What is the main purpose of sentencing (e.g., punishment, rehabilitation, protect society)? What do I believe are the most important principles of sentencing and why? To what extent do I believe current sentencing practices disproportionately disadvantage certain groups? How do judges create 'law' and influence society through sentencing?
- What are my beliefs about the harmfulness (and wrongfulness) of drugs? What are my beliefs about people who sell drugs? What is my understanding of addiction? What information informs my opinions?
- How do my personal and political beliefs: Impact how I see the world? Inform my understanding about the role of law in society? Shape my personal and professional goals? Shape what I understand to be 'right' and 'wrong'?
- To what extent do I believe it is the judges' role to uphold laws and statutes? If I practiced in a different jurisdiction or country, would my opinions be different?
- Have I considered a range of legal theories to inform my decision?

Education about critical reflexivity, anti-oppression, anti-racism, and decolonization are increasingly evidence in law curricula[770] and there is potential for further improvements, drawing on interdisciplinary resources.[771]

4.2.3 Improve Evidence Informed Law and Research Literacy

Review of judicial decisions reveals that lawyers and judges occasionally rely on empirical research for knowledge that can inform decisions. The degree to which empirical research is considered in cases appears to differ according to the level of the court, the judge, and the lawyers. There are arguments to be made for systemic changes that create more uniform opportunities and expectations around evidence-informed law practices. Lawyers and judges, for example, may be required to substantiate knowledge claims about harm in research and not solely on past cases. It is one thing to cite past cases as sources of legal interpretation and precedent; it is something else entirely to rely on a past case as a source of empirical research, unless the credibility has been ascertained. As stated by Judge Berger in Bengert, "*The doctrine of precedent does not apply to evidence*. There is no justification for following a judgment which is shown to be based on expert testimony which cannot be supported." [emphasis added].[772]

---

[770] See e.g. Anjana Mudambi et al, "Toward Critical Reflexivity through Critical Intercultural Communication Pedagogy: Student Discourse in an Intercultural Conflict Course" (2023) 87:3 Western J Communication 347; Sarah-Jane Nussbaum, "Critique-Inspired Pedagogies in Canadian Criminal Law Casebooks: Challenging 'Doctrine First, Critique Second' Approaches to First-Year Law Teaching" (2021) 44:1 Dal LJ 209; Nicole O'Byrne, "Teaching Aboriginal Law in an Age of Reconciliation" (2019) 9:1 Antistasis 56; Etienne C. Toussaint, "The Purpose of Legal Education" (2023)111:1 Calif L Rev 1.

[771] See e.g. George Sefa Dei &Mairi McDermott, *Politics of Anti-Racism Education: In Search of Strategies for Transformative Learning* vol 27 (Springer, 2013); Donna Baines, ed, *Doing Anti-Oppressive Practice: Social Justice Social Work,* 3rd ed, (Halifax, NS: Fernwood Publishing, 2017); Susan Tilley & Leanne Taylor, "Understanding Curriculum as Lived: Teaching for Social Justice and Equity Goals" (2013) 16:3 Race, Ethnicity & Ed 406; Anila Zainub, *Decolonization and Anti-Colonial Praxis: Shared Lineages* (Leiden: Brill, 2019); Fatima Pirbhai-Illich, Shauneen Pete & Fran Martin, eds, *Culturally Responsive Pedagogy: Working Towards Decolonization, Indigeneity and Interculturalism* (Cham, Switzerland: Palgrave Macmillan, 2017); Sheila Cote-Meek & Taima Moeke-Pickering, ed, *Decolonizing and Indigenizing Education in Canada*. (Toronto: Canadian Scholars, 2020); Julie Cupples, & Ramón Grosfoguel, eds, *Unsettling Eurocentrism in the Westernized University* (Abingdon: Routledge, 2019).

[772] *Bengert, supra* note 645 at 29. The judge describes information about cocaine cited in past cases that was refuted by expert witnesses. The judge advocated for accessing new empirical research to inform decisions and refraining from endorsing exaggerated representations:

> The movement [to ban cocaine] was based on scientific knowledge, but accompanied by exaggerated, sometimes hysterical, claims regarding the evils of cocaine. Unfortunately, it is

Legal scholars acknowledge, "The judiciary has made an honest effort to educate judges and to make modern scientific tools available to them in the performance of their judicial duties."[773] In my observations, judges cited a limited range of empirical research about drugs to support or inform their own position about the gravity of the offence. I am concerned with the extent to which the citations are truly evidence-informed and to what extent lawyers and judges are citing past cases as authoritative sources of scientific knowledge.

Idealistically, I would recommend that courts be provided funding to create roles for judicial research support personnel or to broaden the scope of articled clerks, clerks, and in-house researchers. These personnel would be skilled at knowledge synthesis, assessing the quality of research, and delineating judicial rhetoric from substantiated knowledge claims. It would be their role to inform lawyers and judges about contemporary knowledge pertaining to topics before the court. Increased funding could be dedicated to maintain databases that include access to the most current research findings about specific issues for lawyers, judges, and the public to consult. For instance, an open source

---

> the latter which still survive, even though the former did--and still does today--constitute a sound basis for banning it. (at 22)
> The tendency to exaggerate the evils of cocaine persists. Dr. John Unwin, in *R. v. Perteet*, B.C.S.C, 4th June 1975 (not yet reported), told Anderson J. that cocaine produces increased sexual desire "which can at times lead to a sudden rape". Then he said that "in quite a few individuals there is a touchiness and an irritability which quite easily turns into heightened suspiciousness, which can go on to a frank paranoid state, and there is also a proneness to violence, even in the casual user who has taken just enough of a dosage to get an average high from the drug." (at 23).
> These statements simply do not square with the medical literature and with the opinions of the eminent witnesses who have come before me. (at 24)
> Dr. Unwin also gave evidence before Hugessen A.C.J.S.C. in *R. v. Arellano* (1975), 30 C.R.N.S. 367 (Que. S.C.). He indicated that cocaine psychosis is common among cocaine users and that anyone in the grip of such a psychosis is likely to be violent. Dr. Griffith described this evidence as propaganda. Dr. Henderson said it was exaggerated. The suggestion by Dr. Unwin that heavy chronic use of cocaine by intravenous injection invariably leads to violence was regarded as an oversimplication of a complex matter. Dr. Unwin's assertion that "give me any personality whatsoever, and I can inject enough cocaine over a period of time to make him violent and dangerous" was rejected by Dr. Henderson. He said it was "far too sweeping a statement for a scientist to make". (at 25)
> Dr. Unwin said that once someone uses cocaine he will be compelled to use it again and again. This view was repudiated by the experts that I have heard. They say that many persons use it once or twice or oftener and then decide not to use it again. (at 26)

[773] Shetreet, *supra* note 24 at 411.

database could be created to collate the most up-to-date evidence about drug effects, drug related harm, effectiveness of legal principles to achieve legal objectives, and so on.

Making use of existing resources within the current legal system, in order to improve the relevance, accuracy, and credibility of using research and other reliable information sources to inform law, policy, and decisions about people's lives, it is imperative to build research literacy among lawyers and judges.[774] One option is to better prepare lawyers and judges to understand and utilize research as a core part of the education curriculum.[775] Another option is to provide opportunities for professional development among practicing lawyers and judges. When lawmakers do not have adequate research literacy, they may inadvertently use research in ways that lead to flawed reasoning and, thus, flawed decisions. Legal professionals are ethically obligated to ensure they avoid introducing inaccuracy into their decisions by misinterpreting or misrepresenting research data.[776] To enhance research literary, I provide the following recommendations:

The first recommendation is to improve understanding about the breadth of scientific knowledge(s) that exist to help understand social phenomenon. Research is conducted with a degree of rigour, regardless of whether it involves a double-blinded random control trial, case study, focus groups, ethnography, discourse analysis, or decolonising methodologies. Nicholas Hooper observes, "courts continue to struggle with tactical burdens whenever the experts stop short of empirical certainty." Yet, as was discussed above, 'certainty' is an unrealistic expectation.[777] Research studies will always have

---

[774] Irving Shapiro, "Science and Law" (1977) 17:3 Brooklyn Law Rev 195.
[775] Justice Binnie, *supra note* 587.
[776] When research is introduced to influence or provide a rationale for a judicial decision, this becomes evidence and it is imperative the information is portrayed accurately and honestly, without falsification. The potential for inaccurate information or misinformation to have negative impacts in society is evident. Dempster et al, report, for example, that journalists are often motivated to share research in ways that are sensationalized, which can result in misrepresentation and harmful recommendations. The authors argue that "Scientists, science communicators and journalists have an obligation to frame science as interesting and newsworthy without jeopardizing the truth." Lawyers and judges also have particular motivations for their introduction of research in judicial processes. Given the impact of their decisions, lawyers and judges should be held to the same or higher standards for accurate and appropriate use of research as journalists. Dempster, et al, "Scientific Research in News Media: A Case Study of Misrepresentation, Sensationalism and Harmful Recommendations" (2022) 21:1 J Sci Communication 1 at 18.
[777] Nicholas Hooper, "The Phenomenology of Medico-Legal Causation" (2017) 40:2 Dal Law J 579 at 590.

limitations, so research literacy is required to be able to determine the extent to which the data should be relied on in relation to particular arguments or positions.

The second recommendation is increased responsibility within legal systems to reduce the creation and/or reproduction of bias though irresponsible and unethical citation of empirical research. I outline basic parameters to improve the effectiveness of drawing on research to inform law:

1. Lawyers and judges should have access to high-quality peer-reviewed research.

2. It insufficient to seek a single source to validate a knowledge claim; instead, it is important to comprehensively examine the body of knowledge and evaluate the degree of consistency and divergence across findings.[778]

3. Ensure all relevant data is considered; do not just select findings that support a particular argument. In other words, no selective 'cherry-picking' of findings that work in favour of a desired conclusion while disregarding unfavourable findings.[779]

4. Recognise that research findings relevant to one context may not be relevant in novel situations. It is important to consider the extent to which research conducted in one context with one population is transferable or generalizable to the topic at hand.[780]

5. It is generally inappropriate to cite secondary sources; rather, primary sources should be read to mitigate reproducing inaccurate or incomplete interpretations.[781] This means that it is not sufficient to cite another case, a newspaper article, or a government report to substantiate a research claim. Access the research paper and

[778] National Academies of Sciences, Engineering, *Reproducibility and Replicability in Science* (Washington, DC: National Academies Press, 2019).
[779] Chittaranjan Andrade, "HARKing, Cherry-Picking, P-Hacking, Fishing Expeditions, and Data Dredging and Mining as Questionable Research Practices" (2021) 82:1 J Clin Psy 1.
[780] The degree to which findings might apply in other contexts refers to 'transferability' or 'generalizability.' William G Tierney & Randall F Clemens, "Qualitative Research and Public Policy: The Challenges of Relevance and Trustworthiness" in John C Smart & Michael B Paulsen, eds, *Higher Education: Handbook of Theory and Research* vol 26 (New York: Springer Netherlands, 2011) 57.
[781] For instance, if data is reported in a newspaper article, it is important to review the actual cited research.

read it yourself. During the appeal process, it is generally insufficient for higher courts to assume that research findings accepted as 'fact' in lower courts are accurate.

6. Finally, evaluating the credibility of research requires critical reflection on the extent to which researchers' worldviews, decisions, and conduct are explicitly and implicitly shaped by societal and institutional influences that can create, reproduce, and reify inequities and oppression.[782]

Without basic research literacy, there may be little to no benefit in drawing on research at all. In fact, unskilled, or uncritical, use of research data can produce laws that create or perpetrate harms. Those who use empirical research in in legal documents should be held to realistic standards to ensure research enhances the quality of decisions. Further research is required to explore the influence of expert testimony on judicial decision. An intriguing topic for future study related to the circumstances under which empirical evidence that conflicts with a judge's knowledge and values becomes persuasive.

Judges are faced with demands to make decisions about a wide range of social issues and cannot be expected to be experts in all topics, nor will they have the time to conduct a comprehensive literature review of contemporary research about each topic, the social contexts in which they occur, and the social impacts of criminalization.[783] Past cases tend to serve as the primary source for knowledge – not just knowledge about past precedent or legal interpretation, but of scientific knowledge as well, with is not advisable. Nonetheless, it is recommended that judges (continue to) be contentious about the trustworthiness of facts or knowledge cited from past cases, particularly if the cases are

[782] Diane G Cope, "Methods and Meanings: Credibility and Trustworthiness of Qualitative Research" (2014) 41:1 Oncology Nurs Forum 89; Hamza R'boul, "Postcolonial Interventions in Intercultural Communication Knowledge: Meta-Intercultural Ontologies, Decolonial Knowledges and Epistemological Polylogue" (2022) 15:1 J Int & Intercultural Communication 75; Amie Thurber, et al, "Resident Experts: The Potential of Critical Participatory Action Research to Inform Public Housing Research and Practice" (2020) 18:4 Action Res 414.

[783] For an example of complex considerations of underlying social contexts, see: H Archibald Kaiser, "Borde and Hamilton: Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence" (2003) 8 Criminal Reports CR-ART 289; H Archibald Kaiser, "Hamilton: A Regrettable Retrenchment by the Ontario Court of Appeal" (2004) 22 Criminal Reports CR-ART 57.

dated and more recent research is available or if the language used functions to stigmatize as much (or more than) it functions to inform.

4.3 STUDY LIMITATIONS

The majority of cases reviewed in this study related to trafficking. Simple possession cases or those that do not come before the court may construct the harms of drugs in different ways, so the findings in this paper cannot be generalized to every case. For feasibility, Section 3.2.2 did not include a full analysis of the construction of harm for all types of drugs discussed in the judicial decisions, though those drugs were considered in all other sections of the analysis.

The search strategy resulted in a broad scope of cases, with complex representations of harm. Selection of search terms, in any study, necessarily constrains the breadth of cases included for screening. In this study, the terms 'harm principle' and 'harm to society' were used instead of 'harm,' as the number of ineligible cases that would be included for screening would have been unwieldy, as discussed in Section 2.2.2. The term 'harm principle' largely resulted a relatively narrow perspective on harm, with most cases citing *Malmo-Levine*.

It is also important to consider that concepts relating to harm may be addressed in cases, but without using the word 'harm' (e.g., 'injury,' 'overdose,' 'cost'); these cases would also not have been be identified or included. As noted in Figure 1, forty-one decisions were excluded because they did not directly discuss harm in relation to importation, possession, production, and/or trafficking of drugs. For instance, the term harm may only have been used when summarizing sentencing principles. Such cases that relate to drugs may be of interest for future comparative analysis, as judicial decisions are effectively made without proselytizing risks for harm.

Another limitation arises from the decision to exclude mitigating and aggravating factors from data analysis. Harm was not directly discussed in these sections, so this data fell outside the scope of the study. Future studies might extend analysis to examine the ways

in which aggravating and mitigating factors are discursively constructed. This may broaden analysis to better understand rationales for sentencing that extend beyond a focus on the discursive construction of harm.

When cases were appealed, and harm was discussed in both cases, only the higher court decision was included for analysis. If harm was not explicitly addressed in the decision of a higher court, the decision of the lower court was included. It is possible that harm may have been more thoroughly discussed in cases of lower courts, as some appeals related more to a procedural matter than sentencing principles.

While the availability of written judicial decisions presents many advantages, CDA can be enriched through analysis of verbal discourse as well, including features such as tone of voice, eye contact, and body language.[784] There is opportunity for deeper exploration of values, ideology, and power through ethnographic methodologies that include direct observation in courts where sentences are delivered.

4.4 CONCLUSION

I conclude there are opportunities for judges to adapt their approach to sentencing as a discursive genre.[785] Most importantly, I suggest that judges confront assertions of neutrality. Language use is inherently *not* value-free. Legal scholars are divided about the extent to which judge's personal moral values should influence decisions. My perspectives align with theorists who suggest that it is impossible for judges to fully bracket[786] their moral principles when evaluating the impact of another person's conduct within society. I recommend evaluation of current post-secondary education programs and professional development opportunities for judges and lawyers, to determine whether contemporary needs are being met to promote: 1) critical reflexivity[787] of one's

[784] *Mann*, *supra* note 756.
[785] While this thesis focused on the analysis of judicial decisions, the findings relate equally to lawyers. Many quotes that included moralization language cited in the findings were introduced by lawyers. The quality of evidence considered by judges often rests on what the lawyer(s) choose to provide (or not). Thus, lawyers are equally accountable in their responsibility to develop research literacy and practice critical reflexivity.
[786] Defined in footnote 583 above.
[787] Defined in footnote 64 above.

positionality and how that influences personal values and perspectives, 2) skills development to appropriately access research and discern the trustworthiness of various knowledge sources, and 3) promote an appreciation for the moral culpability[788] and responsibility of law professionals pertaining to how stigma is produced and reproduced through their own speech and writing.

The impact of judicial decisions extends far beyond the performative nature of discourse resulting from the communication of a decision with impacts for the person accused. Through discourse, judges intentionally and unintentionally communicate underlying values, acceptable ways of understanding social (and criminal) conduct, and legitimate ways of talking about fellow citizens. When a judge (or anyone for that matter), refers to a fellow human as an "unfortunate addict," a "predator," or a "parasite," value judgments are being conveyed. This type of language and associated tropes are cited in textbooks and journal articles and are integrated into course curricula, thus being viewed as appropriate, professional, taken-for-granted truths. When citing cases that include moralization language for the espoused legal principles or theory, yet neglecting to acknowledge and confront underlying meanings, values, ideology, and power relations, there is an unnecessary risk of perpetuating institutionalized stigma and contributing to oppressive and inequitable processes and practices.

The findings in my thesis are necessarily limited to addressing my research question, but there is opportunity for more research in this area. I did not examine predictive factors for the presence of moralization language, such as the positionality of the judge, the level of court, which sentencing principle(s) were most influential in constructing the rationale, or the severity of the sentence within the suggested range. While such factors might be interesting, such information is likely not a necessary prerequisite for improvements to be made.

It is also worth noting that my findings do not represent the full extent of stigmatizing language that I observed. The language used to label and describe people identified as

[788] Nicholas Ogle, "'You Should Have Known': Aquinas on Negligence and Moral Culpability" (2022) 42:1 J Society Christian Ethics 119; Sweeny-Block, Elizabeth, "White Privilege and the Erroneous Conscience: Rethinking Moral Culpability and Ignorance," (2019) 39:2 J Society Christian Ethics 357.

experiencing addictive disorders was often quite troubling. Similarly, my analysis did not extend to stigmatization related to factors of poverty, race, or gender, but my general observation is that further research is warranted to examine these areas more comprehensively.

I present these findings as an opportunity for reflection and improvement of individual practices and systemic processes. Despite the limitations of empirical research, the rationale for judicial decisions will be strengthened by supporting knowledge claims with reliable and credible data about actual harms of drugs and trafficking (ideally distinguishing from harms arising from criminalization), reduced reliance on tropes, inclusion of individualized assessment of actual evidence of harms posed by the conduct of the accused, refraining from using moralization language that creates and reinforces stigma, and refraining from citing past cases as sources of research evidence.

The findings of this thesis represent my own deliberations arising from a study integrating social sciences and law. The findings and interpretations are an opening of a conversation – they are neither definitive nor final, as research, law, and my own situated knowledge are constantly evolving.

BIBLIOGRAPHY

JURISPRUDENCE

Bills, Legislation, and Related Proceedings

Canada Supreme Canada Reports Part 1 Vol 1 [2000] 1 S.C.R. 3-206

Canada Supreme Court Reports, Part 1 Vol 3 [1997] 3 SCR. 3-211

An Act to Prohibit the Importation, Manufacture and Sales of Opium for other than Medicinal Purposes, SC 1908, c 50

Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, House of Commons, 1st Sess, 44th Parl, 2021 (first reading 7 December 2021)

Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022, c 15 (assented to 17 November 2022)

Cannabis Act, SC 2018, c 16, LC 2018, ch 16

Cannabis Regulation Act, C-5.3, ch I.1

Controlled Drugs and Substances Act, SC 1996, c 19, LC 1996, ch 19

Criminal Code, RSC, 1985, c C-46

Department of Public Safety and Emergency Preparedness Act, SC 2005, c 10

Federal Courts Rules SOR/98-106, Rule 52.2.

Ferment-on-Premises Regulations made under Section 50 of the *Liquor Control Act* R.S.N.S. 1989, c. 260 O.I.C. 2014-441 (October 28, 2014), N.S. Reg. 164/2014

Food and Drugs Act, RSC 1985, c F-27, LRC 1985, ch F-27

Food and Drug Regulations, CRC, c 870

Good Samaritan Drug Overdose Act, SC 2017, c 4

Narcotic Control Act, R.S.C. 1985, c. N-1

Respect for Communities Act, SC 2015, c 22

Safe Streets and Communities Act, SC 2012, c 1

Sorenson, Kevin, "Mental Health and Drug and Alcohol Addiction in the Federal Correctional System: Report of the Standing Committee on Public Safety and National Security" (December 2010, 40th Parliament, 3rd Session) online: <https://www.ourcommons.ca/Content/Committee/403/SECU/Reports/RP4864852/securp04/securp04-e.pdf>

The Honourable Jane Philpott, "Government Response to the Report of the Standing Committee on Health Entitled: Report and Recommendations on the Opioid Crisis in Canada" (nd) online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/HESA/report-6/response-8512-421-134>

Tobacco and Vaping Products Act, SC 1997, c 13, LC 1997, ch 13

Cases

Arsenault-Cameron v Prince Edward Island, 1999 3 SCR 851, 1999 3 RCS 851, 1999 SCJ No 75, 1999 ACS no 75

Assn of Canadian Distillers v Canadian Radio-Television and Telecommunications Commission (TD), 1995 2 FC 778, 1995 FCJ No 886

Bell ExpressVu Limited Partnership v Rex, 2002 2 SCR 559, 2002 SCC 42, 2002 2 RCS 559, 2002 SCJ No 43, 2002 ACS no 43

British Columbia (Director of Civil Forfeiture) v Wolff, 2012 BCJ No 2420, 2012 BCCA 473, 330 BCAC 161, 357 DLR (4th) 437, 297 CCC (3d) 391, 2012 CarswellBC 3628, 221 ACWS (3d) 337

Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, 2011 3 SCR 134

Carter v Canada (*Attorney General*), 2015 SCC 5, 2015 1 SCR 331

Drummond Wren, 1945 OR 778

Murray-Hall v Quebec (Attorney General), 2023 SCC 10

Pearson v Canada (Minister of Justice), 2008 FC 1161

Postar v Postar, 1941 OJ 124

Providence Health Care Society v Canada (Attorney General), 2014 BCJ No 1058, 2014 BCSC 936

R c Cobb, 2022 QJ No 7537, 2022 QCCQ 5171

R c Martinez, 2023 QJ No 73, 2023 QCCQ 15

R c Nelson, 2019 QJ No 4931, 2019 QCCQ 3534

R v Abude, 2016 2016 BCJ No 592, BCSC 543

R v Aeichele, 2022 BCJ No 233, 2022 BCSC 195

R v Agecoutay, 2008 SJ No 326, 2008 SKQB 171, 316 SaskR 281

R v Ahmed, 2007 OJ No 5838, 2007 CarswellOnt 7357

R v Alcantara, 2017 AJ No 134, 2017 ABCA 56, 136 WCB (2d) 500, 47 Alta LR (6th) 71, 2017 CarswellAlta 215, 353 CCC (3d) 254

R v Andrews, 2016 OJ No 5563, 2016 ONSC 5475

R v Alex, 2017 1 SCR 967, 2017 SCC 37, 2017 1 RCS 967, 2017 SCJ No 37, 2017 ACS no 37

R v Anderson, 2014 SCC 41, 2014 2 SCR 167

R v Anderson, 2021 NSJ No 334, 2021 NSCA 62, 405 CCC (3d) 1, 74 CR (7th) 333, 2021 CarswellNS 570, 174 WCB (2d) 577

R v Aujla, 2016 AJ No 1248, 2016 ABPC 272

R v Babineau, 2017 OJ No 7255, 2017 ONSC 4872

R v Bacchus, 2011 OJ No 5800, 2011 ONSC 7531

R v Bank, 2021 AJ No 818, 2021 ABCA 223, 2021 CarswellAlta 1438, 2021 11 WWR 657, 175 WCB (2d) 128, 31 Alta LR (7th) 1, 406 CCC (3d) 329

R v Beaven, 2013 SJ No 180, 2013 SKQB 91, 415 SaskR 279

R v Begon, 2017 BCJ No 862, 2017 BCSC 757

R v Bengert, Robertson et al, (No 14), 1979 BCJ No 2052, 52 CCC (2d) 100

R v Berry, 2011 OJ No 3551, 2011 ONSC 8016, 97 WCB (2d) 313, 2011 CarswellOnt 7708

R v Briscoe, 2019, OJ No 2031, 2019 ONSC 2471

R v Brown, 2020 NLSC 103

R v Burke, 2008 PESCTD 11 (CanLII)

R v Butler, 1992 1 SCR 452, 1992 1 RCS 452, 1992 SCJ No 15, 1992 ACS no 15

R v Caldwell, 2008 NSJ No 83, 2008 NSSC 67, 263 NSR (2d) 182, 77 WCB (2d) 741

R v CAM, 1996 SCJ No 28, 1996 1 SCR 500

R v Campbell, 2021 BCJ No 971, 2021 BCSC 853

R v Carswell, 2018 SJ No 73, 2018 SKQB 53, 409 CRR (2d) 205

R v Carter, 2017 SJ No 108, 2017 SKQB 74

R v Castelein, 2018 MJ No 57, 2018 MBQB 37

R v Ceballos, 2015 OJ No 536, 2015 ONSC 720, 2015 CarswellOnt 1315, 119 WCB (2d) 106

R v Chesshire, 2019 BCJ No 2315, 2019 BCSC 2070

R v Chen, 2021 BCJ No 787, 2021 BCSC 697

R v Choi, 2019 BCJ No 2398, 2019 BCPC 295

R v Clay, 2003 3 SCR 735, 2003 SCC 75, 2003 3 RCS 735, 2003 SCJ No 80, 2003 ACS no 80

R v Clunis, 2018 OJ No 1627, 2018 ONCJ 194

R v Comer, 2015 AJ No 795, 2015 ABPC 140

R v Cook, 2010 ONSC 5016

R v Cormier, 2018 NBJ No 150, 2018 NBCA 38, 2018 AN-B no 150, 366 CCC (3d) 1, 2018 CarswellNB 266

R v Chouhan, 2020 SCJ No 101, 2021 SCC 26, 2020 ACS no 101, 459 DLR (4th) 193, 2021EXP-1699, EYB 2021-392503, 2021 CarswellOnt 9154, 401 CCC (3d) 1, 72 CR (7th) 1, 163 OR (3d) 399

R v Jason De Giorgio, 2014 OJ No 912 2014 ONSC 1274

R v Dawson, 1986 AJ No 236, 70 AR 12, 28 CCC (3d) 46, 16 WCB 201

R v Debrowney, 1992 SJ No 89, 97 SaskR 262, 15 WCB (2d) 403

R v Deflorimonte, 2005 OJ No 6182

R v Derycke, 2016 BCJ No 2053, 2016 BCPC 291

R v DESM (BCCA), 1993 BCJ No 702, 24 BCAC 305

R v DLW 2016 1 SCR 402, 2016 SCC 22, 2016 1 RCS 402, 2015 SCJ No 22, 2015 ACS no 22

R v Do, 2019 BCJ No 975, 2019 BCCA 191

R v Dymkowski, 2022 OJ No 5359, 2022 ONSC 6821

R v Ellis, 2021 BCJ No 2584, 2021 BCPC 280

R v Ellis, 2022 BCJ No 1509, 2022 BCCA 278, 2022 WCB 1356, 417 CCC (3d) 102, 82 CR (7th) 223, 2022 CarswellBC 2224

R v Ethier, 2018 OJ No 913, 2018 ONSC 1200

R v Etmanskie, 2019 NSJ No 548, 2019 NSPC 74

R v Feser, 2015 AJ No 1376, 2015 ABQB 786

R v Find, 2001 1 SCR 863, 2001 SCC 32, 2001 1 RCS 863, 2001 SCJ No 34, 2001 ACS no 34, 2001 CanLII 32

R v Fitzpatrick, 2017 BCJ No 2192, 2017 BCPC 319

R v Fleming, 2014 BCJ No 2454, 2014 BCPC 220, 2014 CarswellBC 2908

R v Forbes, 1937 69 CCC 140 (BV co Ct)

R v Frazer, 2017 AJ No 500, 2017 ABPC 116, 58 Alta. L.R. (6th) 185

R v Friesen, 2019 BCJ No 1186, 2019 BCSC 1038

R v Fyfe 2017 SKQB 5

R v Gambilla, 2015 ABQB 571

R v Gilker, 2022 NBJ No 346, 2022 NBKB 247

R v Gill, 2021 BCPC 351

R v Gladue, 1999 1 SCR 688, 1999 1 RCS 688, 1999 SCJ No 19, 1999 ACS no 19, 23 CR(5th) 197, 133 CCC (3d) 385

R v Grant, 2007 MJ No 193, 2007 MBQB 135, 216 ManR (2d) 219

R v Guilbride, 2006 BCJ No 2047, 2006 BCCA 392, 230 BCAC 128, 211 CCC (3d) 465, 145 CRR (2d) 91, 71 WCB (2d) 220

R v Hamilton, 2004 OJ No 3252, 186 CCC (3d) 129

R v Harmes, 2022 BCJ No 723, 2022 BCSC 663

R v Hassall, 2013 BCJ No 1680, 2013 BCSC 1391, 2013 CarswellBC 2341

R v Hendrickson, 2017 BCJ No 178, 2017 BCSC 176

R v Hendy, 2014 BCJ No 3068 (CA), 2014 BCCA 485, 364 BCAC 183

R v Hills, 2023 SCJ No 2, 2023 SCC 2, 2023 ACS no 2, EYB 2023-508876, 520 CRR (2d) 303, 2023EXP-285, [2023] 2 WWR 187, 2023 WCB 5, 422 CCC (3d) 1, 477 DLR (4th) 1, 51 Alta LR (7th) 253, 520 CRR (2d) 303, 85 CR (7th) 221, 2023 CarswellAlta 171

R v Howard, 2021 BCJ No 1478, 2021 BCPC 167

R v Hulshof, 2019 BCJ No 706, 2019 BCSC 638

R v Ipeelee, 2012, 280 CCC (3d) 265 (SCC)

R v Jablonski, 2018 OJ No 6950

R v JAC, 1995 CanLII 635 (OCA)

R v Johnson, 2015 OJ No 2819, 2015 ONSC 80

R v Jordan, 2014 BCJ No 2499, 2014 BCSC 1887, 2014 CarswellBC 2961

R v JS, 2018 NJ No 290

R v Kayode, 2008 OJ No 4884, 2008 CanLII 63210 (ON SC)

R v Khan, 2019 BCJ No 2415 2019 BCPC 300

R v Khosravi, 2019 BCJ No 601, 2019 BCSC 509

R v Kielt, 2019 BCSC 2458

R v Kim, 2022 BCSC 518

R v Kimmel, 2009 QJ No 480, 2009 QCCS 261, EYB 2009-153639

R v Knott, 2012 2 SCR 470, 2012 SCC 42, 2012 2 RCS 470, 2012 SCJ No 42, 2012 ACS no 42

R v Krause, 2015 BCJ No 3105, 2015 BCPC 305

R v Kwok, 2015 BCJ No 137, 2015 BCCA 34, 2015 CarswellBC 172, 120 WCB (2d) 610, 320 CCC (3d) 212, 366 BCAC 228

R v Lacasse, 2015 3 SCR 1089, 2015 SCC 64, 2015 3 RCS 1089, 2015 SCJ No 64, 2015 ACS no 64

R v Lapointe, 1998 BCJ No 2704

R v Laverick, 1976 BCJ 1146

R v Legerton, 2015 AJ No 456, 2015 ABQB 268, 604 AR 373

R v Leitner, 2013 SJ No 15, 2013 SKQB 1, 411 Sask.R. 79, 2013 CarswellSask 20

R v Lepine, 1994 88 CCC (3d) 1 SCC

R v Lloyd, 2016, 1 SCR 130, 2016 SCC 13, 2016 1 RCS 130, 2016 SCJ No 13, 2016 ACS no 13

R v Lovis, 1972 BCJ 606, 1972 6 WWR 185

R v Lucas, 2002 BCJ No 1631, 2002 BCPC 268

R v Lynn, 2018 BCJ No 6848, 2018 BCSC 2183

R v Lyons, 1987 2 SCR 309, 1987 2 RCS 309, 1987 SCJ No 62, 1987 ACS no 62

R v M (CA), 1996 1 SCR 500

R v Malenovic, 2017 BCJ No 1886, 2017 BCPC 274

R v Malmo-Levine; R v Caine, 2003 3 SCR 571, 2003 SCC 74

R v Malt, 2016 BCJ No 2192, 2016 BCPC 322

R v Manhas, 2019 BCJ No 1462, 2019 BCSC 1293

R v Mann, 2018 BCJ No 1237, 2018 BCCA 265

R v Mabior, 2012 2 SCR 584, 2012 SCC 47, 2012 2 RCS 584, 2012 SCJ No 47, 2012 ACS no 47

R v Marshall, 2013 OJ No 4494, 2013 ONSC 6206, 2013 CarswellOnt 13817

R v Martin, 2021 NBJ No 255, 2021 NBQB 223, 2021 AN-B no 255

R v Maruska, 1981 60 CCC (2d) CanLII 3299 (QC CS)

R v Massey, 2012 BCJ No 1465, 2012 BCSC 935, 2012 CarswellBC 2067

R v Mazerolle, 2022 NBJ No 34, 2022 AN-B. no 342022 NBQB 38

R v McArthur, 2017 BCJ No 1520, 2016 BCPC 464

R v McWhirter, 2018 BCJ No 6897, 2018 BCSC 2239

R v Millar, 2005 BCJ No 2514, 2005 BCSC 1571

R v Milne, 2021 BCSC 1859

R v Mitchell, 2022 BCJ No 2560, 2022 BCSC 2321

R v Mohan, 1994 2 SCR 9, 1994 2 RCS 9, 1994 SCJ No 36, 1994 ACS no 36, 1994 CanLII 80

R v Moore, 2009 BCJ No 2880, 2009 BCSC 1926, 2009 CarswellBC 3900, 94 WCB (2d) 189

R v Morrison, 2019 NSJ No 409, 2019 NSPC 38

R v Morris, 2018 OJ No 4631, 2018 ONSC 5186, 422 CRR (2d) 154

R v Murphy, 2021 NJ No 8, 2021 NLCA 3, 398 CCC (3d) 354

R v Nasogaluak, 2010 1 SCR 206, 2010 SCC 6, 2010 1 RCS 206, 2010 SCJ No 6, 2010 ACS no 6

R v Nguyen, 2017 BCJ No 1792, 2017 BCPC 261

R v Nicholls, 2003 BCJ No 881, 2003 BCPC 132

R v Normore, 2005 AJ No 543, 2005 ABQB 75, 386 AR 69

R v Noseworthy, 2019 NLSC 23

R v Oates (Nfld CA), 1992 NJ No 165, 100 Nfld & PEIR 289

R v Oduro, 2022 OJ No 954, 2022 ONSC 530

R v Oraha, 2012 OJ No 973, 2012 ONSC 1439, 2012 CarswellOnt 2951

R v Parker, 2000 OJ No 2787, 49 OR (3d) 481, 188 DLR (4th) 385, 135 OAC 1, 146 CCC (3d) 193, 37 CR (5th) 97, 75 CRR (2d) 233, 47 WCB (2d) 116, 2000 CanLII 5762

Parker and Clay, 2000 146 CCC (3d) 276

R v Parranto, 2021 SCJ No 46, 2021 SCC 46, 2021 ACS no 46, 75 CR (7th) 217, EYB 2021-418889, 2021EXP-2759, 2021 CarswellAlta 2846, 2022 1 WWR 1, 31 Alta LR (7th) 213, 411 CCC (3d) 1, 463 DLR (4th) 389

R v Payne, 2017 NJ No 306

R v Potts, 2011 BCJ No 38, 2011 BCCA 9, 298 BCAC 185, 266 CCC (3d) 279, 2011 CarswellBC 37, 92 WCB (2d) 812

R v Proulx, 2000 1 SCR 6, 2000 SCC 5, 2000 1 RCS 61, 2000 SCJ No 6, 2000 ACS no 6

R v Reid, 2015 NSJ No 405, 2015 NSSC 276, 365 NSR (2d) 90

R v REM, 2008 SCJ No 52, 2008 SCC 51, 2008 3 SCR 3, 2008 3 RCS 3, 235 CCC (3d) 290, 83 BCLR (4th) 44, EYB 2008-148153, JE 2008-1861, 2008 11 WWR 383, 260 BCAC 40, 60 CR (6th) 1, 380 NR 47, 2008 CarswellBC 2037, 79 WCB (2d) 321, 297 DLR (4th) 577

R v Richard Quast, 2020 OJ No 5056, 2020 ONSC 6870

R v Rider, 2013 MJ No 165, 2013 MBQB 116, 292 ManR (2d) 174

R v Rosales, 2001 QJ No 919, JE 2001-866, 2001 CanLII 21315, REJB 2001-23312

R v Roufosse, 2001 NWTJ No 6, 2001 NWTTC 1

R v Rowley, 2014 OJ 2610

R v Sargeant, 1974 60 Cr App R 74

R v Sawh, 2016 OJ No 6768, 2016 ONSC 7797, 370 CRR (2d) 235

R v Sauve, 2017 AJ No 195, 2017 ABPC 19, 48 Alta LR (6th) 388

R v Schmok, 2009 BCJ No 1351 2009 BCSC 929

R v Shropshire, 1995 4 SCR 227, 1995 4 RCS 227, 1995 SCJ No 52, 1995 ACS no 52

R v Sentes, 2017 BCJ No 333, 2017 BCSC 290

R v Shallow, 2019 OJ No 131, 2019 ONSC 403

R v Shaw, 2005 CCAN para 10,073, 2005 BCCA 380, 2005 BCJ No 1648, 214 BCAC 233, 199 CCC (3d) 93, 67 WCB (2d) 257, 2005 CarswellBC 1752

R v Sheppard, 1 SCR 869, 2002 SCC 26, 2002 1 RCS 869, 2002 SCJ No 30, 2002 ACS no 30

R v Shusterman, 2012 BCJ No 484, 2012 BCSC 362, 2012 CarswellBC 2401

R v Sidhu, 2008, OJ No 3479

R v Sihota, 2016 BCJ No 2696, 2016 BCPC 410

R v Simmonds, 2021 NSJ No 71, 2021 NSSC 54

R v Simpson, 2006 NSJ No 547, 2006 NSSC 404

R v Smith, 2017 BCJ No 471, 2017 BCCA 112

R v Smith (Edward Dewey), 1987 1 SCR 1045, 1987 1 RCS 1045, 1987 SCJ No 36, 1987 ACS no 36

R v Song, 2009 OJ No 5319, 2009 ONCA 896, 249 CCC (3d) 289, 257 OAC 221, 100 OR (3d) 23

R v Sonnenberg, 2018 BCJ No 7018, 2018 BCPC 347

R v Suter, 2018 2 SCR 496, 2018 SCC 34, 2018 2 RCS 496, 2018 SCJ No 34, 2018 ACS no 34

R v Switucka, 2009 SJ No 598, 2009 SKQB 372, 342 SaskR 316

R v Szucs, 2021 BCJ No 1616, 2021 BCSC 1441

R v Toth, 2017 BCSC 501

R v Tran, 2016 OJ No 2568, 2016 ONSC 3225

R v Truax, 2021 AJ No 379, 2021 ABCA 97, 2021 7 WWR 381, 20 Alta LR (7th) 1, 2021 CarswellAlta 637

R v Turmel, 2001 QJ No 5875, 2002 RJQ 246, JE 2002-213

R v Ursino and Dracea, 2019 OJ No 1083, 2019 ONSC 1171

R v Valentini, 1999 OJ No 251, 43 OR (3d) 178

R v Vezina A.L. (Private), 2013 CM 3015

R v Vickerson, 2016 BCJ No 1448, 2016 BCPC 204

R v Wall, 2018 BCJ No 3250, 2018 BCSC 1643

R v Webber, 2021 BCJ No 2692, 2021 BCPC 296

R v White, 2020 NSJ No 131, 2020 NSCA 33, 387 CCC (3d) 106

R v Williams, 2010 OJ No 2971, 2010 ONSC 3904

R v Yoshikawa, 2014 AJ No 491, 2014 ABQB 163, 583 AR 201

RJR-MacDonald Inc. v. Canada (Attorney General), 1995 3 SCR 199, 1995 3 RCS 199

Other legal documents

Ouimet, Roger, *Toward Unity: Criminal Justice and Corrections* (Ottawa: The Queen's Printer, 1969).

SECONDARY MATERIAL

Books and book chapters

Alba-Juez, Laura & J Lachlan Mackenzie, "Emotion Processes in Discourse" in J Lachlan Mackenzie & Laura Alba-Juez, eds, *Emotion in Discourse* (Amsterdam: John Benjamins Publishing Company, 2019) 3.

Arias, Enrique Desmond & Thomas Grisaffi, eds, *Cocaine: From Coca Fields to the Streets* (Durham: Duke University Press, 2021).

Baines, Donna, ed, *Doing Anti-Oppressive Practice: Social Justice Social Work*, 3rd ed, (Halifax, NS: Fernwood Publishing, 2017).

Bakhtin, Mikhail M, *The Dialogic Imagination* translated by C Emerson & M Holquist (Austin: University of Texas Press, 1981/2008)

Bell, John, *Policy Arguments in Judicial Decisions* (Oxford: Oxford University Press, 1983).

Benjamin N Cardozo, *The Nature of the Judicial Process*. (London: Yale University Press, 1949) at 12-13.

Bhatia, Vijay K, *Worlds of Written Discourse: A Genre-Based View* (London: Continuum, 2004).

Biesta, Gert J J & Nicholas C Burbules, *Pragmatism and Educational Research* (Lanham, Maryland: Rowman and Littlefield, 2003).

Bogart, William A, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

Bosmajian, Haig A, *Metaphor and Reason in Judicial Opinions* (Carbondale: Southern Illinois University Press, 1992).

Bosmajian, Haig A, *The Language of Oppression* (Washington: Public Affairs Press, 1974).

Boyd, Susan C, *Busted: An Illustrated History of Drug Prohibition in Canada*. (Winnipeg: Fernwood, 2017).
Boyd, Susan C & Connie Carter, *Killer Weed: Marijuana Grow Ops, Media, and Justice* (Toronto: University of Toronto Press, 2018).

Boyd, Susan C, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada.* (Winnipeg: Fernwood, 2016).

Brands, Bruna, Beth Sproule & Joan Marshman, Drugs and Drug Abuse, 3rd ed, (Toronto: Addiction Research Foundation, 1998).

Braun, Victoria & Victoria Clarke, *Thematic Analysis: A Practical Guide* (London: SAGE Publications, 2022).

Carstairs, Catherine, *Jailed for Possession: Illegal Drug Use, Regulation, and Power in Canada, 1920-1961* (Toronto: University of Toronto Press, 2017).

Chew, R H, R E Hales and S C Yudofsky, *What Your Patients Need to Know About Psychiatric Medications*, 2nd ed, (Washington, DC: American Psychiatric Publishing, 2009).

Cole, David & Julian V Roberts, "Sentencing in Canada: Current Issues and Concluding Thoughts" in David Cole & Julian V Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 390.

Conrad, Peter, *The Medicalization of Society* (Baltimore: The John Hopkins University Press, 2007).

Cote-Meek, Sheila & Taima Moeke-Pickering, ed, *Decolonizing and Indigenizing Education in Canada*. (Toronto: Canadian Scholars, 2020)

Cover, Robert, *Narrative, Violence, and the Law: The Essays of Robert Cover* edited by Martha Minow, Michael Ryan & Austin Sarat (Ann Arbor: University of Michigan Press, 1992).

Coyle, M J, *Talking Criminal Justice: Language and the Just Society* (Abingdon: Routledge, 2013).

Craig, Elaine, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018).

Cupples, Julie, & Ramón Grosfoguel, eds, Unsettling Eurocentrism in the Westernized University (Abingdon: Routledge, 2019).

Deal, Amy Rose, A Theory of Indexical Shift: Meaning, Grammar, and Crosslinguistic Variation (Cambridge, MA: The MIT Press, 2020).

Decter, A, "Into the Darkness of Creation: An Editor's Journey" in Wendy E Waring, ed, *By, For & About: Feminist Cultural Politics* (Toronto: Women's Press, 1994) 115.

Denzin, N K, "The Cinematic Society and the Reflexive Interview" in J F Gubrium & J A Holstein, eds, *Postmodern Interviewing* (Thousand Oaks: SAGE Publications, 2003) 141.

Desroches, Frederick J, *The Crime that Pays: Drug Trafficking and Organized Crime in Canada* (Toronto: Canadian Scholars' Press 2005).

Dodek, Adam & Richard Devlin, "'Fighting Words: Regulating Judges in Canada" in Richard Devlin, & Adam Dodek, eds, *Regulating Judges: Beyond Independence and Accountability* (Cheltenham: Edward Elgar Publishing, 2016) 76.

Durant, Allan & Janny H C Leung, *Language and Law: A Resource Book for Students*, 1st ed. (London: Routledge, 2017).

Dave Elder-Vass, *The Reality of Social Construction* (New York: Cambridge University Press, 2012).

Epstein, Lee & Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford: Oxford University Press, 2014).

Evans, Bryan, Carlo Fanelli & Tom McDowell, eds, Rising Up: The Fight for Living Wage Work in Canada (Vancouver: University of British Columbia Press, 2021).

Fairclough, Norman, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

Fairclough, Isabela & Norman Fairclough, *Political Discourse Analysis* (Abingdon: Routledge, 2012).

Foeglin, R, Figuratively Speaking (New Haven: Yale University Press, 1986).

Foster, Elissa & Arthur P Bochner, "Social Constructionist Perspectives in Communication Research" in James A Holstein & Jaber F Gubrium, eds, *Handbook of Constructionist Research*, (New York: Guilford Press, 2008) 85.

Freire, Paulo, *Pedagogy of the oppressed*, translated by M B Ramos (New York: The Continuum International Publishing Group Inc, 1970/2007).

Gee, James Paul, *How to Do Discourse Analysis: A Toolkit* (New York: Routledge, 2011).

Gee, James Paul, *An Introduction to Discourse Analysis: Theory and Method* (New York: Routledge, 2011).

Goffman, Erving, *Stigma: Notes on the Management of Spoiled Identity* (London: Penguin Books, 1963).

Goode, Erich, "Labelling Theory" in *Encyclopedia of Criminology and Criminal Justice* (New York: Springer New York, 2018) 2814

Greene, Maxine, *Releasing the Imagination: Essays on Education, the Arts, and Social Change* (San Francisco: Jossey-Bass, 1995) at 47.

Hall, Stuart, "The Whites of Their Eyes" in Adam Jaworski & Nicholas Coupland, eds, *The Discourse Reader* (Abingdon: Routledge, 2010) 396.

Hengartner, Michael P, *Evidence-Biased Antidepressant Prescription: Overmedicalisation, Flawed Research, and Conflicts of Interest* (Cham: Palgrave Macmillan, 2022).

Hirschl, Ran, *Comparative Matters the Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2016).

Hogarth, John, *Sentencing as a Human Process*. *Canadian Study in Criminology* (Toronto: University of Toronto Press, 1971).

Howell, Kerry, *An Introduction to the Philosophy of Methodology* (SAGE Publications Ltd, 2013).

Hunter, Rosemary, "Judicial Diversity and the 'New' Judge" in Sonia Harris-Short, Hilary Sommerlad, Steven Vaughan, & Richard Young, eds, *The Futures of the Legal Education and the Legal Profession* (Oxford: Hart Publishing, 2015) 79.

Katzung, Bertram G, Marieke Kruidering-Hall & Anthony J Trevor, "Introduction" in Bertram G Katzung, M Kruidering-Hall & A J Trevor, eds, *Katzung & Trevor's Pharmacology: Examination & Board Review,* 12th ed (New York: McGraw-Hill Education, 2019).

Kaiser-Derrick, Elspeth, I*mplicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019).

Kiepek, Niki, "Contextualising Substance Use Among Professionals in Canada" in Katinka van de Ven, Kyle J D Mulrooney & Jim McVeigh, *Human Enhancement Drugs*, vol 2 (UK: Routledge, forthcoming in 2024).

Koram, Kojo, *The War on Drugs and the Global Colour Line* (London, UK: Pluto Press, 2019).

Leavy, Patricia, *Research Design: Quantitative, Qualitative, Mixed Methods, Arts-Based, and Community-Based Participatory Research Approaches* (New York: Guilford Press, 2017).

Lloyd, Annemaree, *The Qualitative Landscape of Information Literacy Research Perspectives*, *Methods and Techniques* (London: Facet Publishing 2021).

Lord Justice Laws, "Should Judges Make Law?" in Jeremy Cooper, ed, *Being a Judge in the Modern World: A Collection of Lectures from Some of the Most Eminent Judges and Legal Commentators in the UK and Beyond* (Oxford: Oxford University Press, 2017) 199.

Lord Thomas of Cwmgiedd, "The Centrality of Justice: Its Contributions to Society and its Delivery" in Jeremy Cooper, ed, *Being a Judge in the Modern World: A Collection of Lectures from Some of the Most Eminent Judges and Legal Commentators in the UK and Beyond* (Oxford: Oxford University Press, 2017) 149.

MacFarlane, Bruce A, et al, *Drug Offences in Canada*, 4th ed (Toronto: Carswell, 2015).

Mallea, Paula, *The War on Drugs: A Failed Experiment* (Toronto: Dundurn, 2014).

Malleck, Dan, *When Good Drugs Go Bad: Opium, Medicine, and the Origins of Canada's Drug Laws* (Vancouver: UBC Press, 2015).

Montigny, Edgar-André, *The Real Dope: Social, Legal, and Historical Perspectives on the Regulation of Drugs in Canada* (Toronto: University of Toronto Press, 2017).

Muttart, Daved, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007).

National Academies of Sciences, Engineering, *Reproducibility and Replicability in Science* (Washington, DC: National Academies Press, 2019).

National Academies of Sciences, Engineering, Health and Medicine Division, Board on Population Health and Public Health Practice, and Committee on the Health Effects of Marijuana: An Evidence Review and Research Agenda, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (Washington, DC: National Academies Press, 2017).

Noonan, John T & Kenneth I Winston, *The Responsible Judge: Readings in Judicial Ethics* (Westport: Praeger, 1993).

Nutt, D J, *Drugs Without the Hot Air: Making Sense of Legal and Illegal Drugs,* 2nd ed (Cambridge: UIT Cambridge Ltd, 2020).

Osborn, Michael, *Metaphor and Style* (East Lansing: Michigan State University Press, 2018).

Pavlich, George, & Matthew P Unger, "Introduction" in George Pavlich & Matthew P. Unger, eds, *Entryways to Criminal Justice: Accusation and Criminalization in Canada*. (Edmonton: University of Alberta Press, 2019) ix.

Peters, Michael A & Nicholas C Burbules, *Poststructuralism and Educational Research* (Lanham, Maryland: Rowman and Littlefield, 2004).

Philips, Susan Urmston, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (New York: Oxford University Press, 1998).

Phillips, Denis C & Nicholas C Burbules, *Postpositivism and Educational Research* (Lanham, Maryland: Rowman & Littlefield Publishers, 2000).

Pirbhai-Illich, Fatima, Shauneen Pete & Fran Martin, eds, *Culturally Responsive Pedagogy: Working Towards Decolonization, Indigeneity and Interculturalism* (Cham, Switzerland: Palgrave Macmillan, 2017).

Potter, Jonathan & Alexa Hepburn, "Discursive Constructionism" in James A Holstein & Jaber F Gubrium, eds, *Handbook of Constructionist Research* (New York: The Guilford Press, 2008) 275.

Roach, Kent, *Criminal Law. Essentials of Canadian Law,* 8th ed (Toronto: Irwin Law, 2022).

Ruby, Clayton, et al. *Sentencing,* 9th ed (Toronto: LexisNexis Canada, 2017).

Seddon, Toby, *A History of Drugs: Drugs and Freedom in the Liberal Age* (New York: Routledge, 2010).

Seear, Kate, *Laws, Drugs and the Making of Addiction: Just Habits* (New York: Routledge, 2020).

Sefa, George J, Dei &Mairi McDermott, *Politics of Anti-Racism Education: In Search of Strategies for Transformative Learning*, vol 27 (Springer, 2013)

Shuy, Roger W "Discourse Analysis in the Legal Context." In The Handbook of Discourse Shuy, Roger W, "Discourse Analysis in the Legal Context" in Deborah Tannen, Heidi E Hamilton & Deborah Schiffrin, eds, *The Handbook of Discourse Analysis* (Oxford: Wiley Blackwell, 2018) 822.

Singer Merrill, *Something Dangerous: Emergent and Changing Illicit Drug Use and Community Health* (Long Grove: Waveland Press Inc, 2006).

South, Nigel, "Debating Drugs and Everyday Life: Normalisation, Prohibition and 'Otherness'" in Nigel South, ed, *Drugs: Culture, Controls, and Everyday Life* (Thousand Oaks: SAGE, 1999) 1.

Steele, Linda, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge, Taylor & Francis Group, 2020).

Szasz, Thomas, *The Medicalization of Everyday Life* (Syracuse: Syracuse University Press, 2007).

Tator, Charles H, (ed), *Catastrophic Injuries in Sports and Recreation Causes and Prevention: A Canadian Study* (Toronto: University of Toronto Press, 2008).

Tierney William G & Randall F Clemens, "Qualitative Research and Public Policy: The Challenges of Relevance and Trustworthiness" in John C Smart & Michael B Paulsen, eds, *Higher Education: Handbook of Theory and Research* vol 26 (New York: Springer Netherlands, 2011) 57.

Valverde, Mariana, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003).

Valverde, Mariane, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge: Cambridge University Press, 1998).

van Dijk Teun A, *Discourse and Power* (London: Palgrave Macmillan, 2008).

van Hoecke, Mark, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 1st ed (Oxford: Hart Publishing, 2011).

van Leeuwen, Theo, "Multimodality" in Deborah Tannen, Heidi E Hamilton and Deborah Schiffrin, eds, *The Handbook of Discourse Analysis* (Oxford: Wiley Blackwell, 2018) 448.

Zainub, Anila, *Decolonization and Anti-Colonial Praxis: Shared Lineages*. (Leiden: Brill, 2019).

Peer-reviewed articles

Amitai Maya, et al., "An Increase in IL-6 Levels at 6-Month Follow-up Visit Is Associated with SSRI-Emergent Suicidality in High-Risk Children and Adolescents Treated with Fluoxetine" (2020) 40 Eur Neuropsychopharm 61.

Chittaranjan Andrade, "HARKing, Cherry-Picking, P-Hacking, Fishing Expeditions, and Data Dredging and Mining as Questionable Research Practices" (2021) 82:1 J Clin Psy 1.

Arbel, Efrat, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 Can JL Soc 437.

Arksey, Hilary & Lisa O'Malley, "Scoping Studies: Towards a Methodological Framework" (2005) 8:1 Intl J Soc Research Method 19.

Bardwell, Geoff, et al., "'People Need Them or Else They're Going to Take Fentanyl and Die': A Qualitative Study Examining the 'Problem' of Prescription Opioid Diversion During an Overdose Epidemic" (2021) 279 Soc Sci & Med 113986.

Bardwell, Geoff, et al, "Trusting the Source: The Potential Role of Drug Dealers in Reducing Drug-Related Harms via Drug Checking" (2019) 198 Drug & Alcohol Dependence 1.

Beck, Cynthia A, et al., "Antidepressant Utilization in Canada" (2005) 40:10 Soc Psych Epidemiology 799.

Berger, Margaret A & Lawrence M Solan, "The Uneasy Relationship between Science and Law" (2008) 73:3 Brooklyn Law Rev 847.

Bernstein, Anya, "Saying What the Law Is" (2023) 48:1 Law & Soc Inquiry 14.

Blazhenkova, Olesya & Kivilcim Dogerlioglu-Demir, “The Shape of the Pill: Perceived Effects, Evoked Bodily Sensations and Emotions” (2020) 15:9 PloS One e0238378.

Matthew Bonn, et al, “Addressing the Syndemic of HIV, Hepatitis C, Overdose, and COVID-19 Among People Who Use Drugs: The Potential Roles for Decriminalization and Safe Supply” (2020) 81:5 J Studies on Alcohol & Drugs 556.

Bonn, Matthew, et al, “Safe Supply in The Midst of a Crisis of Unregulated Toxic Drug Deaths - A Commentary on Roberts and Humphreys” (2023) 84:4 J Studies Alcohol & Drugs 648.

Boyd, Jade, et al., “Social-Structural Factors Influencing Periods of Injection Cessation among Marginalized Youth Who Inject Drugs in Vancouver, Canada: An Ethno-Epidemiological Study” (2017) 14 Harm Reduction J 530;

Budd, Kate, et al., “Metaphor, Morality and Legitimacy: A Critical Discourse Analysis of the Media Framing of the Payday Loan Industry” (2019) 26:6 Organization 802.

Cahill-O'Callaghan, Rachel J, “The Influence of Personal Values on Legal Judgments” (2013) 40:4 JL & Soc'y 596.

Callaghan, Russell C, et al., “Canada’s Cannabis Legalization and Drivers’ Traffic-Injury Presentations to Emergency Departments in Ontario and Alberta, 2015-2019” (2021) 228 Drug and Alcoh Dependence 109008.

Carhart-Harris, et al., “Psychedelics and the Essential Importance of Context” (2018) 32:7 J Psychopharm 725.

Chandler, John, et al., “Engineering and Legal Considerations for Decommissioning of Offshore Oil and Gas Infrastructure in Australia” (2017) 131 Ocean Engin 338.

Chang, Hasok, “Realism for Realistic People” (2018) 9:1 Spont Gen 31.

Chisholm-Burns, et al., “The Opioid Crisis: Origins, Trends, Policies, and the Roles of Pharmacists” (2019) 76:7 Am J Health-System Pharm 424.

Comeau, Emilie, et al. “‘More of the Same, but Worse than before’: A Qualitative Study of the Challenges Encountered by People Who Use Drugs in Nova Scotia, Canada during COVID-19” (2023) 18:3 PloS e0283979.

Cook, Kay & Kristin Natalier, “Gender and Evidence in Family Law Reform: A Case Study of Quantification and Anecdote in Framing and Legitimising the ‘Problems’ with Child Support in Australia” (2016) 24:2 Fem Legal Stud 147.

Cook, R J, B M Dickens, & J N Erdman, “Emergency Contraception, Abortion and Evidence Based Law” (2006) 93:2 Intl J Gyn Ob 191.

Coomber, Ross & Leah Moyle, “Beyond Drug Dealing: Developing and Extending the Concept of ‘Social Supply’ of Illicit Drugs to 'Minimally Commercial Supply’” (2014) 21:2 Drugs: Edu, Prevention & Policy 157.

Cope, Diane G, “Methods and Meanings: Credibility and Trustworthiness of Qualitative Research” (2014) 41:1 Oncology Nurs Forum 89.

Cover, Robert M, “Violence and the Word” (1986) 95:8 Yale LJ 1601.

Dagenhardt, Danielle M. Romain, “‘You Know Baseball? 3 Strikes’: Understanding Racial Disparity with Mixed Methods for Probation Review Hearings” (2021) 10:6 Social Sciences 235.

Daiski, Isolde, “Perspectives of Homeless People on Their Health and Health Needs Priorities” (2007) 58:3 J Adv Nursing 273.

Dempster, et al, “Scientific Research in News Media: A Case Study of Misrepresentation, Sensationalism and Harmful Recommendations” (2022) 21:1 J Sci Communication 1

Doob, Anthony N & Cheryl Marie Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis” (2003) 30 Crime & Just 143.

Dyck, Erika, “Canada Dry or High Times?: A Historiographical Look at Drugs and Alcohol in Canada” (2021) 102: 2 Can Hist Rev 339.

Earp, Brian D, Jonathan Lewis, & Carl L Hart, “Racial Justice Requires Ending the War on Drugs” (2021) 21:4 Am J Bioethics 4.

Eriksen, Andreas, “The Research Literacy of Professionals: Reconciling Evidence-Based Practice and Practical Wisdom” (2022) 12:3 Professionals & Professionalism e4852

Faigman, David L, “Scientific Realism in Constitutional Law” (2008) 73:3 Brooklyn Law Rev 1067.

Ferencz, Sarah, “Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada” (2020) 43:5 Man LJ 197.

Ferns, George, Aliette Lambert & Maik Gunther, “The Analogical Construction of Stigma as a Moral Dualism: The Case of the Fossil Fuel Divestment Movement” (2022) 65:4 Academy Mngt J 1383.

Forbes, Curtis, “The Future of the Scientific Realism Debate: Contemporary Issues Concerning Scientific Realism” (2018) 9:1 Spont Gen 1.

Foss, Jeff, “Feyerabendian Pragmatism” (2018) 9:1 Spont Gen at 28.

Frey, John J, “An Epidemic, a Scourge, or a Plague” (2017) 116:2 WI Med J 55.

Gagnon, Marilou, et al, “Impact of Safer Supply Programs on Injection Practices: Client and Provider Experiences in Ontario, Canada” (2023) 20:1 Harm Reduction J 81.

Guan, Xin & T Wing Lo, “Restrictive Deterrence in Drug Offenses: A Systematic Review and Meta-Synthesis of Mixed Studies” (2021) 12 Frontiers Psych 727142.

Gray, Rebecca, “Shame, Labeling and Stigma: Challenges to Counseling Clients in Alcohol and Other Drug Settings” (2010) 37:4 Contemp Drug Probs 685.

Greer, Alissa, et al., “Police Discretion to Charge Young People Who Use Drugs Prior to Cannabis Legalization in British Columbia, Canada: A Brief Report of Quantitative Findings” (2020) 27:6 Drugs: Edu, Prevention & Policy 488.

Guillaumier, Ashleigh & Chris Paul, “Anti-Tobacco Mass Media and Socially Disadvantaged Groups: A Systematic and Methodological Review” (2012) 31:5 Drug & Alcohol 698.

Haack, Susan, “Of Truth, in Science and Law” (2008) 73:3 Brooklyn Law Rev at 985-6.

Hannah-Moffat, Kelly & Paula Maurutto, “Re-contextualizing Pre-sentence Reports: Risk and Race” (2010) 12:3 Punishment & Soc 262.

Hodgson, J, E Hughes & C Lambert, “‘SLANG’ - Sensitive Language and the New Genetics - An Exploratory Study” (2005) 14:6 J Genetics Counselling 415 at 416.

Holmes, Andrew Gary Darwin, “Researcher Positionality – A Consideration of Its Influence and Place in Qualitative Research – A New Researcher Guide” (2020) 8:4 Shanlax Intl J Ed 1.

Hooper, Nicholas, “The Phenomenology of Medico-Legal Causation” (2017) 40:2 Dal Law J 579 at 590.

Hrymak, Haley, “A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers” (2018) 41:4 Man LJ 149.

Husak, Douglas, “The Criminal Law as Last Resort” (2004) 24:2 Oxford J Legal Stud 207.

Hutchinson, Allan C, “Towards Judicial Accountability - Are the Excuses Getting Lamer?” (1996) 45 UNB LJ 97.

Hyshka, Elaine, Tania Bubela, & T Cameron Wild, “Prospects for Scaling-up Supervised Injection Facilities in Canada: The Role of Evidence in Legal and Political Decision-Making” (2013) 108:3 Addiction 468.

Ivsins, Andrew, et al, “Tackling the Overdose Crisis: The Role of Safe Supply” (2020) 80 Int J Drug Policy 102769.

Jackson, Lois, et al., “Accessing Drug Treatment Programs in Atlantic Canada: The Experiences of People Who Use Substances” (2022) [ahead of print] Drugs: Education, Prevention and Policy 1.

Johansen, Louise Victoria, “Between Standard, Silence and Exception: How Texts Construct Defendants as Persons in Danish Pre-Sentence Reports” (2018) 29:2 Discourse Soc 123.

Jones, Craig E & Micah B Rankin, “Justice as a Rounding Error - Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada” (2014) 52:1 Osgoode Hall LJ 109.

Kaiser, H Archibald, “Bissonnette: Another Step Forward, After the Harper Decade of Regression in Sentencing” (2022) 81 Criminal Reports CR-ART 343

Kaiser, H Archibald, “Borde and Hamilton: Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence” (2003) 8 Criminal Reports CR-ART 289.

Kaiser, H Archibald, “Hamilton: A Regrettable Retrenchment by the Ontario Court of Appeal” (2004) 22 Criminal Reports CR-ART 57.

Kalant, Harold, “A Critique of Cannabis Legalization Proposals in Canada” (2016) 34 Intl J Drug Policy 5.

Kalant, Harold, “Drug Classification: Science, Politics, Both or Neither?” (2010) 105:7 Addiction 1146.

Kalant, Harold, “The Pharmacology and Toxicology of ‘Ecstasy’ (MDMA) and Related Drugs” (2001) 165:7 Cndn Med Assoc J 917.

Kay, Christopher, “Rethinking Social Capital in the Desistance Process: The ‘Artful Dodger’ Complex” (2022) 19:5 Eur J Criminology 19 1243.

Kennedy, Liam & Madelaine Coelho, “‘Absolutely the Worst Drug I’ve Ever Seen’: Risk, Governance, and the Construction of the Illicit Fentanyl ‘Crisis’” (2020) 24:4 Theor Crim 612.

Karl Klare, “The Politics of Duncan Kennedy’s Critique” (2001) 22 Cardozo Law Rev 1173.

Kiepek, Niki, “Exploring Legitimacy and Authority in the Construction of Truth Regarding Personal Experiences of Drug Use” (2016) 7:2 Addict Research & Therapy 273.

Kiepek, Niki & Brenda Beagan, “Substance Use and Professional Identity” (2018) 45:1 Contemporary Drug Problems 47.

Kiepek, Niki, Brenda Beagan & Jonathan Harris, “A Pilot Study to Explore the Effects of Substances on Cognition, Mood, Performance, and Experience of Daily Activities” (2018) 6:1 Perform Enhanc Health 3.

Kiepek, Niki & Christine Ausman, “‘You are You, but You are Also Your Profession’: Nebulous Boundaries of Personal Substance Use” (2023) 50:1 Contemp Drug Prob 63.

Kiepek, Niki, et al, “‘A Reward for Surviving the Day’: Women Professionals’ Substance Use to Enhance Performance” (2022) 10:2 Performance Enhancement & Health 100220.

Kiepek, Niki, et al., “Exploring Care of Hospital Inpatients with Substance Involvement” (2021) 281 Soc Sci & Med 114071.

Kiepek, Niki, et al., “Seeking Legitimacy for Broad Understandings of Substance Use” (2019) 73 Int J Drug Policy 58.

Kiepek, Niki, et al., “Socially Situated Experiences of Substance Use: A Photo Elicitation Pilot Study” (2023) SAGE Open.

Kiepek Niki, et al., “Substance Use by Social Workers and Implications for Professional Regulation” (2019) 19:2 Drugs Alcohol Today 147.

Kolla, Gillian & Carol Strike, “Practices of Care Among People Who Buy, Use, and Sell Drugs in Community Settings” (2020) 17:1 Harm Reduction 27.

Kristeva, Julia, “Europhilia, Europhobia” (1998) 5:1 Constellations: Intl J Crit & Democratic Theory 321.

Lauzière, Julie, Christopher Fletcher & Isabelle Gaboury, “Factors Influencing the Provision of Care for Inuit in a Mainstream Residential Addiction Rehabilitation Centre in Southern Canada, An Instrumental Case Study into Cultural Safety” (2021) 16:1 Substance Abuse Treatment, Prevention & Policy 1.

Lavalley Jennifer, Shelda Kastor, Jenna Valleriani & Ryan McNeil, “Reconciliation and Canada’s Overdose Crisis: Responding to the Needs of Indigenous Peoples” (2018) 190:50 CMAJ at E1466.

Lazare, Jodi, “Judging the Social Sciences in Carter v Canada (AG)” (2016) 10:1 McGill JL & Health at S35 / (2016) 10: 1 RD & Santé McGill at S35.

Leatherdale, Scott T, et al., “Marijuana and Tobacco Use among Young Adults in Canada: Are They Smoking What We Think They are Smoking?” (2007) 18:4 Cancer Causes & Control 391.

Lee, Sujung, “Re-Evaluating Moral Culpability in the Wake of Gladue” (2020) 78:2 U Toronto Fac L Rev 109.

Livingston, James D & Jennifer E Boyd, “Correlates and Consequences of Internalized Stigma for People Living with Mental Illness: A Systematic Review and Meta-Analysis” (2010) 71:12 Soc Sci & Med 2150.

Macdonald, Scott, Patricia Erickson & Barbara Allen, “Judicial Attitudes in Assault Cases Involving Alcohol or Other Drugs” (1999) 27:3 J Crim Just 275.

Malik, Musa, et al., “Does Regional Variation in Pathogen Prevalence Predict the Moralization of Language in COVID-19 News?” (2021) 40:5-6 J Language Soc Psy 653.

Mańko, Rafał, “Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication” (2022) 33:2 L Critique 175.

Mann, Monique, Helena Menih & Catrin Smith, “There is ‘Hope For You Yet’: The Female Drug Offender in Sentencing Discourse” (2014) 47:3 Aus NZ J Crim 355.

McNeil, Ryan, Marie Jauffret-Roustide & Helena Hansen, “Reducing Drug-Related Harms and Promoting Health Justice Worldwide During and After COVID-19: An AJPH Supplement” (2022) 112:S2 Am J Pub Health S95.

McNeil Ryan, et al., “Hospitals as a 'Risk Environment': An Ethno-Epidemiological Study of Voluntary and Involuntary Discharge from Hospital against Medical Advice among People Who Inject Drugs” (2014) 105 Soc Sci & Med 59.

Michael, Bryane, Indira Carr & Donald Bowser, “Reducing Corruption in Public Administration through Evidence-Based Law: Using Data to Design Land and Implementation Ethics-Related Administrative Law” (2015) 12:2 Man J Intl Econ Law 167.

Mitchell, Matthew, “Analyzing the Law Qualitatively” (2023) 23:1 Qual Research J 102.

Morgan, Kieran, David Prothero & Stephen Frankel, “The Rise in Emergency Admissions—Crisis or Artefact? Temporal Analysis of Health Services Data.” (1999) 319:7203 BMJ 158.

Anjana Mudambi, et al., “Toward Critical Reflexivity through Critical Intercultural Communication Pedagogy: Student Discourse in an Intercultural Conflict Course” (2023) 87:3 Western J Communication 347.

Nadasky, Paul, “The Politics of Tek: Power and the “Integration” of Knowledge” (1999) 36:1/2 Arctic Anthro at 11.

Nedelsky, Jennifer, “Embodied Diversity and the Challenges to Law” (1997) 42:1 McGill Law J 91.

Noseda, Roberta Yasmin Schmid, et al., “MDMA-Related Presentations to the Emergency Departments of the European Drug Emergencies Network Plus (Euro-DEN Plus) over the Four-Year Period 2014-2017” (2021) 59:2 Clin Toxicology 131.

Novak, Goranka Lalić, Teo Giljević & Romea Manojlović Toman, "(Never)Mind the Evidence: Evidence-Based Law-Making in Croatian Regulation on Migration" (2021) 21:2 Croatia & Comparative Pub Admin 205.

Nussbaum, Sarah-Jane, "Critique-Inspired Pedagogies in Canadian Criminal Law Casebooks: Challenging 'Doctrine First, Critique Second' Approaches to First-Year Law Teaching" (2021) 44:1 Dal LJ 209.

Nutt, David J, "Equasy — an Overlooked Addiction with Implications for the Current Debate on Drug Harms" (2009) 23:3 Journal of Psychopharmacology 3.

Nutt, David J, Leslie A King & Lawrence D Phillips, "Drug Harms in the UK: A Multicriteria Decision Analysis" (2010) 376:9752 Lancet 1558.

O'Byrne, Nicole, "Teaching Aboriginal Law in an Age of Reconciliation" (2019) 9:1 Antistasis 56; Etienne C. Toussaint, "The Purpose of Legal Education" (2023)111:1 Calif L Rev 1.

Ogle, Nicholas, "'You Should Have Known': Aquinas on Negligence and Moral Culpability" (2022) 42:1 J Society Christian Ethics 119.

Pauly, Bernadette, et al., "Applicability of a National Strategy for Patient-Oriented Research to People Who Use(d) Substances: A Canadian Experience" (2022) 8:1 Research Involvement & Engagement 22.

Palys, T S & Stan Divorski, "Explaining Sentence Disparity" (1986) 28:4 Can J Criminology 347.

Petroski, Karen, "Legal Fictions and the Limits of Legal Language" (2013) 9:4 Intl JL Context 485.

Popp, J N & S P Boyle, "Railway Ecology: Underrepresented in Science?" (2017) 19 Basic & Applied Ecol 84.

Potts, Amanda & Siobhan Weare, "Mother, Monster, Mrs, I: A Critical Evaluation of Gendered Naming Strategies in English Sentencing Remarks of Women Who Kill" (2018) 31:1 Intl J Semiotics L 21.

Hamza R'boul, "Postcolonial Interventions in Intercultural Communication Knowledge: Meta-Intercultural Ontologies, Decolonial Knowledges and Epistemological Polylogue" (2022) 15:1 J Int & Intercultural Communication 75.

Ratū, David (Rāwiri), "Regulation Urgently Needed to Protect Māori from Alcohol Advertising" (2019) 1500 NZ Med J 132 106.

Reinarman, Craig, "Addiction as Accomplishment: The Discursive Construction of Disease" (2005) 13:4 Addiction Research & Theory 307.

Rodriguez, S M, Liat Ben-Moshe & H Rakes, "Carceral Protectionism and the Perpetually (in)Vulnerable" (2020) 20:5 Criminology & Crim Just 546

Rolles, Stephen, "An Alternative to the War on Drugs" (2010) 341:7764 Brit Med J 127.

Roux, Theunis, "Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour" (2014) 24 Legal Educ Rev 177 17.

Rowe, Malcolm & Leanna Katz, "A Practical Guide to *Stare Decisis*" 2020 *Windsor Rev of Leg & Soc Issues* 41 WRLSI 1.

Roxburgh, Amanda & Julia Lappin, "MDMA-Related Deaths in Australia 2000 to 2018" (2020) 76 Intl J Drug Policy 102630.

Russell, Cayley, et al., "Opioid Agonist Treatment Take-Home Doses ('Carries'): Are Current Guidelines Resulting in Low Treatment Coverage Among High-Risk Populations in Canada and the USA?" (2022) 19:1 Harm Reduction J 1.

Sava, Florin A, et al., "Cost-Effectiveness and Cost-Utility of Cognitive Therapy, Rational Emotive Behavioral Therapy, and Fluoxetine (Prozac) in Treating Depression: A Randomized Clinical Trial" (2009) 65:1 J Clin Psy 36.

Schwartz, Shalom H, et al., "Basic Personal Values Underlie and Give Coherence to Political Values: A Cross National Study in 15 Countries." (2014) 36:4 Polit Behav 899.

Sculthorpe, Alexander, "A Second Chance for the Harm Principle in Section 7: Gross Disproportionality Post-Bedford" (2015) 20 Appeal: Rev Current L & L Reform 71.

Seidenberg, Andrew B, et al., "Awareness of Alcohol as a Carcinogen and Support for Alcohol Control Policies" (2022) 62:2 Am J Prev Med 174.

Shapiro, Irving A, "Science and Law" (1977) 17:3 Brooklyn L Rev 195.

Shi, Hannah D, Sherry A McKee & Kelly P Cosgrove, "Why Language Matters in Alcohol Research: Reducing Stigma" (2022) 46:6 Alcoholism, Clinical & Experimental Res 1103.

Shetreet, Shimon, "On Assessing the Role of Courts in Society" (1980) 10:4 Man LJ 357.

Skosireva, Anna, Patricia O'Campo, Suzanne Zerger, Catharine Chambers, Susan Gapka & Vicky Stergiopoulos "Different Faces of Discrimination: Perceived Discrimination Among Homeless Adults with Mental Illness in Healthcare Settings" (2014) 14:1 BMC Health Serv Research 376.

Solovev, Kirill & Nicolas Pröllochs. "Moralized Language Predicts Hate Speech on Social Media." (2023) 2:1 PNAS Nexus pgac281.

Speiser, Jaime Lynn, William M Lee & Constantine J Karvellas, “Predicting Outcome on Admission and Post-Admission for Acetaminophen-Induced Acute Liver Failure Using Classification and Regression Tree Models” (2015) 10:4 PloS One e0122929.

Staerklé, Cristian, et al, “Common Sense as a Political Weapon: Populism, Science Skepticism, and Global Crisis-Solving Motivations” (2022) 43:5 Pol Psy 913 at 917.

Sternberg, et al, “Testing Common Sense” (1995) 50:11 Am Psychologist 912.

Storbjork, Jessica, “One Model to Rule Them All? Governing Images in the Shadow of the Disease Model of Addiction” (2018) 37:6 Drug & Llcohol Rev 726.

Sullivan, Frankie, “Not Just Language: An Analysis of Discursive Constructions of Disability in Sentencing Remarks, (2017) 31:3 Continuum 411.

Sweeny-Block, Elizabeth, “White Privilege and the Erroneous Conscience: Rethinking Moral Culpability and Ignorance,” (2019) 39:2 J Society Christian Ethics 357.

Taha, Sheena, Bridget Maloney-Hall & Jane Buxton, “Lessons Learned from the Opioid Crisis Across the Pillars of the Canadian Drugs and Substances Strategy” (2019) 14:1 Substance Abuse Treatment, Prevention & Policy 32.

Taylor, Sally, “Deconstructing Imprisonment: Exploring Sentencing Discourses in the District Court of New South Wales” (2022) Criminology & Crim Just 174889582211179.

Thurber, Amie, et al, “Resident Experts: The Potential of Critical Participatory Action Research to Inform Public Housing Research and Practice” (2020) 18:4 Action Res 414.

Tilley, Susan & Leanne Taylor, “Understanding Curriculum as Lived: Teaching for Social Justice and Equity Goals” (2013) 16:3 Race, Ethnicity & Ed 406.

Tonry, Michael, “The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings” (2009) 38:1 Crime & Just 65.

Tosh, Sarah, “Drugs, Crime, and Aggravated Felony Deportations: Moral Panic Theory and the Legal Construction of the ‘Criminal Alien.’” (2019) 27:2 Critical Criminology 329.

Tricco, Andrea C, et al., “A Scoping Review on the Conduct and Reporting of Scoping Reviews” (2016) 16:15 BMC Med Research Method 15.

Tupper, Kenneth W, “Psychoactive Substances and the English Language: Drugs, Discourses, and Public Policy” (2012) 39:3 Contemp Drug Probs 461.

Vezali Costardi, et al., “A Review on Alcohol: From the Central Action Mechanism to Chemical Dependency” (2015) 61:4 Rev Assoc Med Bras 381.

Ward, Cameron, “Canada (A.G.) v. PHS Community Services Society — The Insite Decision” (2012) 50:1 Alberta L Rev 195.

Warde, Bryan, “Black Male Disproportionality in the Criminal Justice Systems of the USA, Canada, and England: A Comparative Analysis of Incarceration” (2013) 17:4 J Afr Am Studies at 461.

Wild, T Cameron, et al., “Canadian Harm Reduction Policies: A Comparative Content Analysis of Provincial and Territorial Documents, 2000–2015” (2017) 45 Intl J Drug Policy 9.

Wilkinson, Claire & Robin Room, “Warnings on Alcohol Containers and Advertisements: International Experience and Evidence on Effects” (2009) 28:4 Drug & Alcohol Rev 426.

Windle, James & Paul Murphy “How a Moral Panic Influenced the World’s First Blanket Ban on New Psychoactive Substances” (2022) 29:3 Drugs: Edu, Prevention & Policy 265.

White, Ben P & Lindy Willmott, “Evidence-Based Law Making on Voluntary Assisted Dying” (2019) 44:4 Aust Health Rev 544.

White, Iain & Gauri Nandedkar, “The Housing Crisis as an Ideological Artefact: Analysing How Political Discourse Defines, Diagnoses, and Responds” (2021) 36:2 Housing Studies 213 at 216.

Wilson, Lauren & Rachel Boratto. “Conservation, Wildlife Crime, and Tough-on-Crime Policies: Lessons from the Criminological Literature” (2020) 251 Bio Conserv 108810.

Xavier, Jessica, et al., “‘There Are Solutions and I Think We’re Still Working in the Problem’: The Limitations of Decriminalization Under the Good Samaritan Drug Overdose Act and Lessons from an Evaluation in British Columbia, Canada.” (2022) 105 Intl J Drug Policy 103714.

Newspaper and Magazine Articles

Aziz, Sarah, “There Are Growing Calls for Drug Decriminalization. Could It Solve Canada’s Opioid Crisis?” (9 November 2021), online: *Global News* <https://globalnews.ca/news/8359890/drug-decriminalization-opioid-crisis/>

BC Gov News, “BC Receives Exemption to Decriminalize Possession of Some Illegal Drugs for Personal Use” (31 May 2022), online: <https://news.gov.bc.ca/releases/2022MMHA0029-000850>

Cooke, Alex, “NS Police Chiefs Back Call to Decriminalize Possession of Small Amounts of Illegal Drugs” (14 July 2020), online: *CBC News* <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-police-chief-decriminalizing-drugs-1.5648297>

Hernandez, Jon, “Why One Researcher Dubs Drug Decriminalization in B.C. an 'Exciting', if Flawed, Experiment” (1 February 2023) online: CBC News <https://www.cbc.ca/news/canada/british-columbia/researcher-dubs-drug-decriminalization-bc-exciting-flawed-experiment-1.6731264>

Little, Simon, “First Step or Misstep? Mixed Reaction to B.C. Drug Decriminalization” (31 January 2023), online: Global News <https://globalnews.ca/news/9446710/bc-decriminalization-pilot-start-reaction/>

Mann, Harman, “Implementing ‘Impact of Race and Culture Assessments’ in the Sentencing of Black Nova Scotian Offenders: R v Anderson” (22 March 2022) thecourt.ca, online < https://www.thecourt.ca/implementing-impact-of-race-and-culture-assessments-in-the-sentencing-of-black-nova-scotian-offenders-r-v-anderson/>.

Napoli, Paul J & Hunter J. Shkolnik, “Jury Concludes Pharmaceutical Companies Fueled Opioid Crisis in NY” (New York: Business Wire, 2021).

Woo, Andrea, “B.C. Court Hears New Appeal in Fentanyl Trafficking Case” (26 May 2022), online: *Globe and Mail* <https://www.theglobeandmail.com/canada/article-bc-court-hears-new-appeal-in-fentanyl-trafficking-case/>

Park, Yoon S, et al, “The Positivism Paradigm of Research” (2020) 95:5 Academic Med 690.

Zimonjic, Peter, “Police Chiefs Call on Ottawa to Decriminalize Possession of Illicit Drugs for Personal Use” (9 July 2020), online: *CBC News* <https://www.cbc.ca/news/politics/chiefs-police-decriminalize-posession-personal-use-1.5643687>

Reports

Global Commission on Drug Policy, “Time to End Prohibition” (2021), online: <https://www.globalcommissionondrugs.org/wp-content/uploads/2021/12/Time_to_end_prohibition_EN_2021_report.pdf>

HESA Committee Report, “Government Report” (December 2016, 42nd Parliament, 1st Session, House of Commons Canada), online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/HESA/report-6/response-8512-421-134#:~:text=The%20Opioid%20Action%20Plan%20outlines,opioids%3B%20supporting%20better%20treatment%20options%3B>

Health Canada Expert Task Force on Substance Use, “Drug Decriminalization and International Law” (March 2021) online: <https://www.drugpolicy.ca/wp-content/uploads/2021/03/HLN_Brief-ETSU-Decrim-intllaw-Mar2021.pdf>

Health Canada Expert Task Force on Substance Use, “Report #1 Recommendations on Alternatives to Criminal Penalties for Simple Possession of Controlled Substances” (6 May 2021), online: <https://www.canada.ca/en/health-canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/expert-task-force-substance-use/reports/report-1-2021.html>

Health Canada Expert Task Force on Substance Use, “Report #2 Recommendations on the Federal Government’s Drug Policy as Articulated in a Draft Canadian Drugs and Substances Strategy (CDSS)” (11 June 2021), online: <https://www.canada.ca/en/health-canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/expert-task-force-substance-use/reports/report-2-2021.html>

Janz, M, “Controlled Drug and Substances Act Section 56(1) Exemption Process” (Report: OCM01092) online: <https://pub-edmonton.escribemeetings.com/filestream.ashx?DocumentId=141862>

Greg Moreau, Canadian Centre for Justice and Community Safety Statistics, “Police-Reported Crime Statistics in Canada, 2021” (3 August 2022) *Statistics Canada*, Juristat.

Office of the Correctional Investigator, “Aboriginal Offenders - A Critical Situation” (16 September 2013), online: < https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx>

Public Safety Canada, “Presentence Reports – Research Summary Vol 10 No 5” (September 2005) online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/prsntc-rprt/index-en.aspx>

Rotermann, Michelle, “Looking Back from 2020, How Cannabis Use and Related Behaviours Changed in Canada” (21 April 2022), online: Health Reports <https://www150.statcan.gc.ca/n1/pub/82-003-x/2021004/article/00001-eng.htm>

Sapers Howard, “Annual Report of the Office of the Correctional Investigator 2013-2014” (27 June 2014), online: *Office of the Correctional Investigator* <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx>

Sims, Jane, “LFP LONGFORM: Police Target Drug Dealers as Fatal Opioid Overdoses Mount” (5 July 2019) online: *London Free Press* <https://lfpress.com/news/local-news/lfp-longform-police-target-drug-dealers-as-fatal-opioid-overdoses-mount>

Sorenson, Kevin, “Mental Health and Drug and Alcohol Addiction in the Federal Correctional System: Report of the Standing Committee on Public Safety and National Security” (December 2010), online: *House of Commons Canada* <https://www.ourcommons.ca/Content/Committee/403/SECU/Reports/RP4864852/securp04/securp04-e.pdf>

Special Committee on Illegal Drugs, *Volume I: Parts I and II* (Chair: Pierre Claude Nolin), (September 2002), online: <https://sencanada.ca/content/sen/committee/371/ille/rep/repfinalvol1-e.htm>

Special Purpose Committee on the Decriminalization of Illicit Drugs, "Decriminalization for Simple Possession of Illicit Drugs: Exploring Impacts on Public Safety & Policing" (July 2020) online: <https://www.cacp.ca/index.html?asst_id=2189>

Special Rapporteur on the Right to Health, "Drug Policy and Drug Use" (2023), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/special-procedures/sr-health/drug-policy-and-drug-use>

Statistics Canada, "Police-reported organized crime, by most serious violation, Canada (selected police services)" (27 July 2023) online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510006201>

Trevethan, Shelley & Christopher J Rastin, "A Profile of Visible Minority Offenders in the Federal Canadian Correctional System" (June 2004), online: *Correctional Service of Canada* <https://www.csc-scc.gc.ca/research/092/r144_e.pdf>

United Nations Office on Drugs and Crime, "World Drug Report 2022" (2022), online: <https://www.unodc.org/unodc/en/data-and-analysis/wdr-2022_booklet-2.html>

WHO/UNICRI "Cocaine Project" (1995) online: <https://www.tni.org/files/article-downloads/200703081409275046.pdf>

World Health Organization, 48th World Assembly, "Summary Records and Reports of Committees" WHA48/1995/REC/3 Geneva (1-12 May 1995) online: <https://www.tni.org/files/article-downloads/200703081419428216.pdf>

Internet Sources

Canadian Drug Policy Coalition, "Harm Reduction in Canada: What Governments Need to Do Now" (May 2017), online: <https://drugpolicy.ca/wp-content/uploads/2017/05/Harm-Reduction-in-Canada-EN.pdf>

Canadian Centre on Substance Use and Addiction, "3,4-Methylenedioxy-Methamphetamine (MDMA, Ecstasy or Molly)" (2022) online: <https://ccsa.ca/sites/default/files/2022-10/CCSA-MDMA-Ecstasy-Drug-Summary-2022-en.pdf>

Canadian Centre on Substance Use and Addiction, "Cocaine" (2022), online: <https://www.ccsa.ca/sites/default/files/2022-10/CCSA-Canadian-Drug-Summary-Cocaine-2022-en.pdf>

Canadian Centre on Substance Use and Addiction, “Ecstasy or Molly (MDMA)” (2017), online: <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Canadian-Drug-Summary-MDMA-2017-en.pdf>

Canadian Centre on Substance Use and Addiction, “Methamphetamine” (2020), online: <https://www.ccsa.ca/sites/default/files/2020-03/CCSA-Canadian-Drug-Summary-Methamphetamine-2020-en.pdf>

Canadian Institute for Health Information, “Opioid Prescribing in Canada How Are Practices Changing?” (2019), online: <https://www.cihi.ca/sites/default/files/document/opioid-prescribing-canada-trends-en-web.pdf>

Canadian Substance Use Costs and Harms Scientific Working Group, “Canadian Substance Use Costs and Harms 2007–2020. (2023) online: Prepared by the Canadian Institute for Substance Use Research and the Canadian Centre on Substance Use and Addiction. Ottawa, ON: Canadian Centre on Substance Use and Addiction <https://csuch.ca/documents/reports/english/Canadian-Substance-Use-Costs-and-Harms-Report-2023-en.pdf>

Criminal Law Notebook, “Sentencing Brief (Generic)” (2023), online: <http://criminalnotebook.ca/index.php/Sentencing_Brief_(Generic)>

Cush, Jack, “Health Canada Issues Acetaminophen Advisory” (10 July 2015) online: *Rheum Now* <https://rheumnow.com/content/health-canada-issues-acetaminophen-advisory>

Drug Policy Alliance, “Can you Become Addicted to Cocaine after Using it Once?” (2022), online: <https://drugpolicy.org/drug-facts/cocaine/addicted-cocaine-one-use>

Dyck, Erika, “Alberta’s new policy on psychedelic drug treatment for mental illness: Will Canada lead the psychedelic renaissance?” (15 January 2023), online: *The Conversation* < https://theconversation.com/albertas-new-policy-on-psychedelic-drug-treatment-for-mental-illness-will-canada-lead-the-psychedelic-renaissance-195061>

Evans-Reeves, Karen, “Bhutan reverses sales ban on tobacco” (1 Feb 2023), online: <https://blogs.bmj.com/tc/2023/02/01/bhutan-reverses-sales-ban-on-tobacco/#:~:text=In%202010%2C%20Bhutan%20was%20lauded,of%20tobacco%20within%20the%20country>

Government of British Columbia, “Buying and Selling Illegal Tobacco” (2021), online: <https://www2.gov.bc.ca/gov/content/taxes/sales-taxes/tobacco-tax/illegal-tobacco>

Government of Canada, “A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code” (20 January 2023), online: <https://www.justice.gc.ca/eng/rp-pr/jr/rppss-eodpa/p4.html>

Government of Canada, “Bill C-22: Mandatory Minimum Penalties to Be Repealed” (7 December 2021), online: *Department of Justice Canada* <https://www.canada.ca/en/department-justice/news/2021/12/mandatory-minimum-penalties-to-be-repealed.html>

Government of Canada, “Safer supply” (25 April 2023) online: <https://www.canada.ca/en/health-canada/services/opioids/responding-canada-opioid-crisis/safer-supply.html>.

Government of Canada, “Strengthening Canada’s Approach to Substance Use Issues” (September 2018), online: <https://www.canada.ca/en/health-canada/services/substance-use/canadian-drugs-substances-strategy/strengthening-canada-approach-substance-use-issue.html>

Government of Canada, “Canadian Cannabis Survey 2022: Summary” (2022), online: <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/research-data/canadian-cannabis-survey-2022-summary.html>

Government of Canada, “Canadian Tobacco and Nicotine Survey (CTNS): Summary of Results for 2020” (2022), online: <https://www.canada.ca/en/health-canada/services/canadian-tobacco-nicotine-survey/2020-summary>

Government of Canada, “Cannabis Legalization and Regulation” (2021), online: <https://www.justice.gc.ca/eng/cj-jp/cannabis/>

Government of Canada, “Cocaine and Crack” (2023), online; <https://www.canada.ca/en/health-canada/services/substance-use/controlled-illegal-drugs/cocaine-crack.html>

Government of Canada, “Consulting Persons with Disabilities” (29 July 2022) online: <https://www.canada.ca/en/employment-social-development/programs/accessible-canada-regulations-guidance/consultation/section2.html>

Government of Canada, “Drugs and Health Products” (2022), online <https://www.canada.ca/en/health-canada/services/drugs-health-products.html>

Government of Canada, “Federal Actions on Opioids to Date” (2023), online: <https://www.canada.ca/content/dam/hc-sc/images/services/opioids/federal-actions/overview/overview.jpg>

Government of Canada, “Fentanyl” (2023), online: <https://www.canada.ca/en/health-canada/services/substance-use/controlled-illegal-drugs/fentanyl.html>

Government of Canada, “Firearms, Accidental Deaths, Suicides and Violent Crime: An Updated Review of the Literature with Special Reference to the Canadian Situation” (29 August 2022) online: ≤https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/wd98_4-dt98_4/p6.html>

Government of Canada, “How we Built a National Action Plan with Partners” (9 March 2023), online: <https://www.rcaanc-cirnac.gc.ca/eng/1590950479157/1590950564663>

Government of Canada “Joint Statement from the Co-Chairs of the Special Advisory Committee on the Epidemic of Opioid Overdoses – Latest National Data on Substance-Related Harms” (26 June 2023) online: <https://www.canada.ca/en/public-health/news/2023/06/joint-statement-from-the-co-chairs-of-the-special-advisory-committee-on-the-epidemic-of-opioid-overdoses--latest-national-data-on-substance-related.html>

Government of Canada, “Opioid- and Stimulant-Related Harms in Canada” (2023), online: <https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants>

Government of Canada, “Original Quantitative Research – How Many Alcohol-Attributable Deaths and Hospital Admissions could be Prevented by Alternative Pricing and Taxation Policies? Modelling Impacts on Alcohol Consumption, Revenues and Related Harms in Canada” (10 June 2020) online: <https://www.canada.ca/en/public-health/services/reports-publications/health-promotion-chronic-disease-prevention-canada-research-policy-practice/vol-40-no-5-6-2020/alcohol-death-hospital-admissions-prevented-pricing-taxation-policies.html>

Government of Canada, “Policy Qs and As: Bill C-5, An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act” (2023), online: <https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/c5/qa-qr.html#s5>

Government of Canada, “Producers and Packagers of Spirits” (October 2022), online: *Canada Revenue Agency* < https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edm3-1-1/producers-packagers-spirits.html>

Government of Canada, “Producers and Packagers of Wine” (June 2022), online: *Canada Revenue Agency* <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/edm4-1-1/producers-packagers-wine.html>

Government of Canada, “Strengthening Canada’s Approach to Substance Use Issues” (September 2018), online: <https://www.canada.ca/en/health-canada/services/substance-use/canadian-drugs-substances-strategy/strengthening-canada-approach-substance-use-issue.html>

Government of Canada, “Substance-Related Acute Toxicity Deaths in Canada from 2016 to 2017: A Review of Coroner and Medical Examiner Files” (2023), online: <https://www.canada.ca/en/health-canada/services/opioids/data-surveillance-research/substance-related-acute-toxicity-deaths-canada-2016-2017-review-coroner-medical-examiner-files.html>

Government of Canada, “Substance Use Spectrum” (2023), online: <https://www.canada.ca/en/health-canada/services/substance-use/about-substance-use.html>

Government of Canada, “The Costs of Tobacco Use in Canada, 2012” (2017), online: <https://www.canada.ca/en/health-canada/services/publications/healthy-living/costs-tobacco-use-canada-2012.html>

Government of Canada, “The Criminal Law in Canadian Society” (1982), online: <https://johnhoward.ca/wp-content/uploads/2016/12/1982-KE-8809-C7-1982-Chretien.pdf>

Government of Canada, “Tobacco and Premature Death” (2023), online: <https://www.canada.ca/en/health-canada/services/health-concerns/tobacco/legislation/tobacco-product-labelling/smoking-mortality.html>

Hales, Craig M, Jennifer Servais, Crescent B Martin & Dafna Kohen, “Prescription Drug Use Among Adults Aged 40–79 in the United States and Canada” (2019), online: <https://www.cdc.gov/nchs/products/databriefs/db347.htm#:~:text=The%20most%20commonly%20used%20types%20of%20prescription%20drugs%20used%20by,and%20antidiabetic%20agents%20(6.6%25)>

Homeless Hub, “Government Benefits” (2021), <https://www.homelesshub.ca/about-homelessness/education-training-employment/government-benefits>

Homeless Hub, “Informal Economy” (2021), online: <https://www.homelesshub.ca/about-homelessness/education-training-employment/informal-economy>

Indigenous Corporate Training Inc, “A Look at First Nations Prohibition of Alcohol” (20 Oct 2016), online: <https://www.ictinc.ca/blog/first-nations-prohibition-of-alcohol#:~:text=Due%20to%20an%20amendment%20to,alcohol%20to%20an%20Indian%20person.>

Interpol, “Drug Trafficking” (2024) online: <https://www.interpol.int/en/Crimes/Drug-trafficking>

Jesseman, Rebecca & Doris Payer, “Decriminalization: Options and Evidence” (June 2018) online: *Canadian Centre on Substance Use and Addiction* <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Decriminalization-Controlled-Substances-Policy-Brief-2018-en.pdf>

Kaur, Jaskiran, Steven R McFaull & Felix Bang “At-a-Glance – Trends in Emergency Department Visits for Acetaminophen-Related Poisonings: 2011–2019” (2020), online: <https://www.canada.ca/en/public-health/services/reports-publications/health-promotion-chronic-disease-prevention-canada-research-policy-practice/vol-40-no-4-2020/trends-emergency-visits-acetaminophen-poisonings-2011-2019.html>

Mayo Clinic, “Alcohol use: Weighing Risks and Benefits” (2021), online <https://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/alcohol/art-20044551>

Merriam-Webster Dictionary “Scourge” online: <https://www.merriam-webster.com/dictionary/scourge>

Merriam-Webster, “Working Class” (2023) online: <https://www.merriam-webster.com/dictionary/working-class>

Mulligan, Brett, “Canada Opens Access for Psilocybin and MDMA Therapy” (24 February 2022), online: <https://greenlightlawgroup.com/blog/canada-opens-access-for-psilocybin-and-mdma-therapy>

National Center for Biotechnology Information “PubChem Compound Summary for CID 62857, Fluoxetine Hydrochloride” (retrieved 18 April 2023) online: *PubChem* <https://pubchem.ncbi.nlm.nih.gov/compound/Fluoxetine-Hydrochloride>

Northcott, Paul, “Just the Facts – Organized Crime” (27 April 2021) *Canadian Mounted Police* online: <https://www.rcmp-grc.gc.ca/en/gazette/just-the-facts-organized-crime>

Office for National Statistics, “Deaths Related to Drug Poisoning in England and Wales: 2016 Registrations” (2017), online: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsrelatedtodrugpoisoninginenglandandwales/2016registrations>

Office on Drugs and Crime, “The Canadian Drugs and Substances Strategy: A Public Health Approach to Substance Use Issues” (September 2018), online: <https://www.unodc.org/documents/commissions/CND/2019/Contributions/Panellists/27_Sept/WEOG_-_Health_Canada.pdf>

Payer, D E, et al., “Adulterants, Contaminants and Co-occurring Substances in Drugs on the Illegal Market in Canada An Analysis of Data from Drug Seizures, Drug Checking and Urine Toxicology” (April 2020), online: Canadian Centre on Substance Use and Addiction <https://www.ccsa.ca/sites/default/files/2020-04/CCSA-CCENDU-Adulterants-Contaminants-Co-occurring-Substances-in-Drugs-Canada-Report-2020-en.pdf>

Province of British Columbia, “LCRB frequently asked questions” (2023,) online: <https://www2.gov.bc.ca/gov/content/employment-business/business/liquor-regulation-licensing/liquor-licence-permits/liquor-resources-information/lcrb-faq#:~:text=It%20is%20generally%20against%20the,dentist%20for%20medical%20purposes%2C%20or>

Public Prosecution Services of Canada, “5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act” (17 August 17, 2020), online: *Public Prosecution Service of Canada Deskbook* <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html>

“Ryan McNeil” (Retrieved on 1 May 2023) online: *University of British Columbia* <https://pwias.ubc.ca/community/ryan-mcneil/>

Russell, Emily, “Canada’s Boozy History” (2023), online: *Cranbrook History Centre* <https://www.cranbrookhistorycentre.com/canadas-boozy-history/>

Stanford Encyclopedia of Philosophy, “Law and Ideology” (22 February 2001; revised 23 April 2019), online: <https://plato.stanford.edu/entries/law-ideology/>

Statistics Canada “Table 1 Top 10 leading causes of death (2019 to 2022)” (27 November 2023) online <https://www150.statcan.gc.ca/n1/daily-quotidien/231127/t001b-eng.htm>

Stockwell, Tim, Samuel Churchill, Adam Sherk, Justin Sorge & Paul Gruenewald, “How Many Alcohol-Attributable Deaths and Hospital Admissions Could be Prevented by Alternative Pricing and Taxation Policies? Modelling Impacts on Alcohol Consumption, Revenues and Related Harms in Canada” (2020), online: <https://www.canada.ca/en/public-health/services/reports-publications/health-promotion-chronic-disease-prevention-canada-research-policy-practice/vol-40-no-5-6-2020/alcohol-death-hospital-admissions-prevented-pricing-taxation-policies.html>

The Nutrition Source, “Caffeine” (2020) online: *Harvard TH Chan School of Public Health* <https://www.hsph.harvard.edu/nutritionsource/caffeine/>

Toronto Public Health, “Exemption Request” (4 January 2022), online: <https://www.toronto.ca/wp-content/uploads/2022/01/943b-TPH-Exemption-Request-Jan-4-2022-FNLAODA.pdf>

Toronto Public Health, “Quick Facts: Harms Associated with Drug Laws” (April 2018), online: <https://www.toronto.ca/wp-content/uploads/2018/05/9888-Harms-Associated-with-Drug-Laws.pdf>

Turner, Logan, “Grassy Narrows First Nation Asserts Sovereignty to Pass Anishinaabe Law on Alcohol Use” (5 May 2021), online: <https://www.cbc.ca/news/canada/thunder-bay/grassy-narrows-traditional-law-alcohol-1.6013562>

UN News, “UNAIDS Upholds Decriminalization, Access to Services, on International Drug Users’ Day” (1 November 2021), online: <https://news.un.org/en/story/2021/11/1104552>

United Nations Chief Executives Board for Coordination, “Summary of Deliberations. CEB/2018/2” (2019), online: <https://www.unsceb.org/CEBPublicFiles/CEB-2018-2-SoD.pdf>

World Health Organization, “Road Traffic Injuries” (2021), <https://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries>

Thesis

Bystrzycki, *Alexia R, Measuring and Assessing the Impact of Race and Culture Assessments in Sentencing* (Master of Laws, Dalhousie University, 2022) [unpublished]

APPENDIX A: Risk and Benefits of Select Substances

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
Acetaminophen	4 billion doses of acetaminophen sold in Canada each year [790]	Reduce pain[791] Reduce fever[792]	Most common cause of acute liver failure in Europe and North America[793] Approximately 4500 overdose hospitalizations in Canada annually[794] Median age of those hospitalized is 14.0 years[795]	Approximately 6% of people hospitalized for overdose develop acute liver conditions that may lead to death[796]	2011-2019: acetaminophen accounted for 13.7% of all poisoning cases[797] Highest rate of accidental poisoning was among children aged 0–4 years[798]	High health care costs for intensive care services, liver transplant, and continuous renal replacement therapy[799]

[789] Includes factors such as healthcare costs, lost productivity, criminal justice, etc.
[790] Jack Cush, "Health Canada Issues Acetaminophen Advisory" (10 July 2015) online: *Rheum Now* https://rheumnow.com/content/health-canada-issues-acetaminophen-advisory [perma.cc/MSH4-462M].
[791] Jaskiran Kaur, Steven R McFaull & Felix Bang "At-a-Glance – Trends in Emergency Department Visits for Acetaminophen-Related Poisonings: 2011–2019" (2020), online: <https://www.canada.ca/en/public-health/services/reports-publications/health-promotion-chronic-disease-prevention-canada-research-policy-practice/vol-40-no-4-2020/trends-emergency-visits-acetaminophen-poisonings-2011-2019.html> [Kaur].
[792] *Ibid.*
[793] Jaime Lynn Speiser, William M Lee & Constantine J Karvellas, "Predicting Outcome on Admission and Post-Admission for Acetaminophen-Induced Acute Liver Failure Using Classification and Regression Tree Models" (2015) 10:4 PloS One e0122929.
[794] *Ibid.*
[795] *Ibid.*
[796] *Ibid.*
[797] Kaur, *supra* note 791.
[798] *Ibid.*
[799] *Ibid.*

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
Fluoxetine[800]	5.8% using any prescribed antidepressants[801]	Used to treat depression, obsessive-compulsive disorder, bulimia nervosa, premenstrual dysphoric disorder[802]	Rash, hives, allergic symptoms[803] Drug interactions associated with potentially life-threatening serotonin syndrome or neuroleptic malignant syndrome[804] Can cause abnormally low sodium in the blood[805] Potential for fetal harm Clinical effects:[806] • Drowsiness • Tremor	May increase suicidality among children, adolescents, and young adults[807]	Contributes to societal over-medicalization[808]	Higher health care costs than psychotherapies[809]

[800] This is one of many commonly prescribed antidepressants, also known by the brand name 'Prozac.' It is a classification of drugs called selective serotonin reuptake inhibitors (SSRIs).
[801] Cynthia A Beck et al, "Antidepressant Utilization in Canada" (2005) 40:10 Soc Psych Epidemiology 799.
[802] National Center for Biotechnology Information "PubChem Compound Summary for CID 62857, Fluoxetine Hydrochloride" (retrieved 18 April 2023) online: *PubChem* https://pubchem.ncbi.nlm.nih.gov/compound/Fluoxetine-Hydrochloride [perma.cc/XBL7-R5JB] ["PubChem Compound Summary"]; R H Chew, R E Hales and S C Yudofsky, *What Your Patients Need to Know About Psychiatric Medications*, 2nd ed, (Washington, DC: American Psychiatric Publishing, 2009).
[803] "Fluoxetine" (2020) 31:7 Brown University Psychopharm Update 9 ["Brown U Psychopharm Update"].
[804] *Ibid.*
[805] *Ibid.*
[806] "PubChem Compound Summary", *supra* note 802
[807] "Brown U Psychopharm Update", *supra* note 803; Maya Amitai, et al,"An Increase in IL-6 Levels at 6-Month Follow-up Visit Is Associated with SSRI-Emergent Suicidality in High-Risk Children and Adolescents Treated with Fluoxetine" (2020) 40 Eur Neuropsychopharm 61.
[808] Michael P Hengartner, *Evidence-Biased Antidepressant Prescription: Overmedicalisation, Flawed Research, and Conflicts of Interest* (Cham: Palgrave Macmillan, 2022).
[809] Florin A Sava, et al, "Cost-Effectiveness and Cost-Utility of Cognitive Therapy, Rational Emotive Behavioral Therapy, and Fluoxetine (Prozac) in Treating Depression: A Randomized Clinical Trial" (2009) 65:1 J Clin Psy 36.

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
			• Headache • Blurred vision • Dizziness • Restlessness • Rarely: seizures and coma • Nausea, vomiting, abdominal pain • Bradycardia, mild hypertension or hypotension			
Alcohol	2020, past 30-days for those 15 years and older: 64%[810]	Moderate use may reduce risk of heart, ischemic stroke, diabetes[811] Pleasure	Excessive drinking may increase risk of:[812] • Certain cancers • Pancreatitis • Sudden death • Heart muscle damage • Stroke • High blood pressure	2014: 15,000 deaths; 245,000 potential years of life lost[813]	2014: 90,000 hospital admissions[814] Risk for impaired driving	$19.7 billion[815] Highest criminal justice costs of any substance in Canada[816]

[810] Government of Canada, "Canadian Tobacco and Nicotine Survey (CTNS): Summary of Results for 2020" (2022), online: <https://www.canada.ca/en/health-canada/services/canadian-tobacco-nicotine-survey/2020-summary> ["Tobacco and Nicotine Survey"].
[811] Mayo Clinic, "Alcohol use: Weighing Risks and Benefits" (2021), online <https://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/alcohol/art-20044551> [perma.cc/WPV2-T8VR].
[812] *Ibid.*
[813] Tim Stockwell, et al, "How Many Alcohol-Attributable Deaths and Hospital Admissions Could be Prevented by Alternative Pricing and Taxation Policies? Modelling Impacts on Alcohol Consumption, Revenues and Related Harms in Canada" (2020), online: <https://www.canada.ca/en/public-health/services/reports-publications/health-promotion-chronic-disease-prevention-canada-research-policy-practice/vol-40-no-5-6-2020/alcohol-death-hospital-admissions-prevented-pricing-taxation-policies.html>
[814] *Ibid.*
[815] Canadian Substance Use Costs and Harms Scientific Working Group, "Canadian Substance Use Costs and Harms 2007–2020. (2023) online: Prepared by the Canadian Institute for Substance Use Research and the Canadian Centre on Substance Use and Addiction. Ottawa, ON: Canadian Centre on Substance Use and Addiction <https://csuch.ca/documents/reports/english/Canadian-Substance-Use-Costs-and-Harms-Report-2023-en.pdf> ["Substance Use Costs and Harms"]
[816] CCSA "Cocaine", *supra* note 513.

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
			• Liver disease • Suicide • Accidental serious injury or death • Fetal impairments • Alcohol withdrawal syndrome			
Tobacco	Use of at least one tobacco product – 2020, past 30-days for those 15 years and older: 12%[817]	Enjoyment[818] Reduce stress[819]	Known/probable cause of >40 diseases of the lungs, heart, and other organs[820]	48,000 deaths in Canada annually[821] 2012: Smoking accounted for 21,366 cancer deaths; 12,710 heart disease deaths; 9,937 respiratory disease deaths[822] Increases risk of dying from common illnesses (e.g., pneumonia)[823] 599,390 potential years of life lost[824]	2012: Second-hand smoke accounted for 993 deaths[825]	$11.2 billion[826]

[817] "Tobacco and Nicotine Survey", *supra* note 810.
[818] *Ibid.*
[819] *Ibid.*
[820] "Tobacco and Premature Death", *supra* note 227.
[821] *Ibid*; Note this is reported to be "more than the total of all deaths due to alcohol, opioids, suicides, murders, and traffic collisions" at para 1.
[822] *Ibid.*
[823] *Ibid.*
[824] Government of Canada, "The Costs of Tobacco Use in Canada, 2012" (2017), online: <https://www.canada.ca/en/health-canada/services/publications/healthy-living/costs-tobacco-use-canada-2012.html>
[825] *Ibid.*
[826] "Substance Use Costs and Harms", *supra* note 815.

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
Cannabis	2020, past 30-days for those 15 years and older: 10% (smoking)[827] 2022, past 12-month for those 16 years and older: 27%[828]	Reduce pain[829] Reduce spasms Enhance socialization Pleasure Manage seizures Increase appetite Alter perception	Withdrawal symptoms associated with dependence[830] Demotivation Longer-term use associated with cognitive impairments (learning, memory)	Data not available; suspected mortality related to impaired driving No conclusive evidence supporting an association between cannabis use and all-cause mortality[831]	Risk for impaired driving[832]	$2.4 billion[833]
Cocaine	2%[834]	Euphoria Feeling happy[835] Mentally alertness Increased energy Enhanced self-confidence	Panic[836] Anxiety Paranoid thinking Restlessness Irritability Tremors	2014: Attributed to 297 premature deaths[837]	Risk for impaired driving	Second-highest criminal justice costs of any substance in Canada[838] $4.2 billion[839]

[827] "Tobacco and Nicotine Survey", *supra* note 810.
[828] "Canadian Cannabis Survey", *supra* note 640.
[829] All effects report by Nutt 2020, *supra* note 231.
[830] All effects report by Nutt, 2020, *supra* note 231; Approximately 10% of people who use cannabis experience a degree of withdrawal symptoms.
[831] National Academies of Sciences, Engineering, Health and Medicine Division, Board on Population Health and Public Health Practice, and Committee on the Health Effects of Marijuana: An Evidence Review and Research Agenda, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (Washington, DC: National Academies Press, 2017).
[832] Research indicates no significant post-legalization increase in traffic-injury emergency rooms visits in Ontario or Alberta since implementation of the *Cannabis Act*, according to Russell C Callaghan, et al, "Canada's Cannabis Legalization and Drivers' Traffic-Injury Presentations to Emergency Departments in Ontario and Alberta, 2015-2019" (2021) 228 *Drug and Alcoh Dependence* 109008.
[833] "Substance Use Costs and Harms", *supra* note 815.
[834] Government of Canada, "Cocaine and Crack" (2023), online; <https://www.canada.ca/en/health-canada/services/substance-use/controlled-illegal-drugs/cocaine-crack.html> [Government of Canada "Cocaine and Crack"]
[835] All effects reported in Government of Canada "Cocaine and Crack", *supra* note 834.
[836] All effects reported in Government of Canada "Cocaine and Crack", *supra* note 834.
[837] CCSA "Cocaine", *supra* note 513; Note: more recent data is not available, as it is conflated with polysubstance use (e.g., opioids, amphetamines)
[838] *Ibid.*
[839] "Substance Use Costs and Harms", *supra* note 815.

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
		Heightened senses: sight, sound, touch Decrease in need for food and sleep	Dizziness Violent behaviour Nausea, vomiting Longer-term mental effects Lung, nose and breathing problems Heart problems Increased risk of stroke Stomach problems			
Methamphetamine[840]	0.2%	Alertness Energy Self-confidence Euphoria	Risk for psychosis or psychotic symptoms (i.e., violent behaviour, paranoia, hallucinations and delusions) Mood swings Insomnia Memory loss Associated with poor nutrition, lack of sleep, weight loss, respiratory Diseases Fetal impairments	No national data available Reported in a large number of opioid-related deaths	Risk for impaired driving	Crime-related costs Health care costs
Fentanyl	Non-prescribed use: No available data Prescribed use, 2018: 12.3% of Canadians were prescribed opioids; fentanyl less	Pain suppressant[842] Euphoria Calming effect	High risk for overdose: 20 to 40 times more potent than heroin; 100 times more potent than morphine[843]	Jan-Sept, 2022: 5,360 apparent opioid toxicity deaths; 81% involved fentanyl; 78% involved opioids that were	Jan-Sept, 2022: 34,886 opioid-related poisoning hospitalizations; 31% involved	High health care costs

[840] Canadian Centre on Substance Use and Addiction, "Methamphetamine" (2020), online: <https://www.ccsa.ca/sites/default/files/2020-03/CCSA-Canadian-Drug-Summary-Methamphetamine-2020-en.pdf>
[842] All effects reported by Government of Canada "Fentanyl", *supra* note 227.
[843] *Ibid.*

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
	frequent than other strong opioids[841]		Mental effects (dizziness, confusion, altered consciousness) Physical effects (drowsiness, slow breathing, nausea and vomiting) Associated with miscarriage, low birth weight, premature delivery, high infant mortality	only non-pharmaceutical[844]	fentanyl or fentanyl analogues[845] 28,197 EMS responses to suspected opioid-related overdoses[846] Risk for impaired driving	
3,4-Methylenedioxy-Methamphetamine	1.1%[847]	Current research about MDMA-assisted psychotherapy for posttraumatic stress disorder, eating disorders, anxieties related to life-threatening illnesses,	Risks are associated with adulterants[849] Long-term effects undistinguished from presence of adulterants[850]	No reported deaths[851] Deaths in 2017-2018 attributed to the presence of an adulterant[852]	Risk for impaired driving	Criminal justice costs; Controlled under Schedule I of the Controlled Drugs and Substances Act, with some exemptions[853]

[841] Canadian Institute for Health Information, "Opioid Prescribing in Canada How Are Practices Changing?" (2019), online: <https://www.cihi.ca/sites/default/files/document/opioid-prescribing-canada-trends-en-web.pdf>
[844] Government of Canada "Opioid- and Stimulant-Related Harms", *supra* note 485.
[845] *Ibid.*
[846] *Ibid.*
[847] CCSA "3,4-Methylenedioxy-Methamphetamine", *supra* note 514.
[849] *Ibid.*
[850] *Ibid.*
[851] *Ibid.*
[852] CCSA "Ecstasy or Molly (MDMA)", *supra* note 518.
[853] CCSA "3,4-Methylenedioxy-Methamphetamine", *supra* note 514.

	Canadian prevalence of use	Health/well-being (benefits)	Health/well-being (adverse effects)	Mortality	Societal impacts	Economic cost[789]
		neurodevelopmental disorders[848] Relaxation Euphoria Arousal Visual illusions, Wakefulness Sensations of well-being Enhanced sociability Heightened stimulation				

[848] All effects reported in CCSA "3,4-Methylenedioxy-Methamphetamine", *supra* note 293.

APPENDIX B: Summary of Cases Reviewed Pertaining to Cannabis Only

[a] Age at time of offence
[b] Citing another case
[c] Citing a secondary source
[d] Expert witness

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
R v Lapointe, 1998 BCJ. No. 2704	Male	Producing marihuana	8 months' incarceration	Use by youth Argument from defense "that the use of marihuana by this offender creates no harm to society" "marihuana is not a serious health hazard unless it is used excessively"[b] "marihuana is less harmful than other proscribed drugs, but it still is harmful" "As a youth court judge I read with monotonous regularity in predisposition reports relating to serious juvenile crimes that the young offender is a regular smoker of marihuana and does not concentrate on her or his school studies" "Marihuana abuse is a serious social problem in this district, even if alcohol abuse is worse"	Specific and general deterrence Gravity Exceptional circumstances "Parliament has, in spite of all the agitation by certain vociferous and passionate advocates of marihuana use, decided that the cultivation of, trafficking in and possession of marihuana must all be punished as socially harmful. These activities remain criminal, and therefore it is futile for this offender to argue that what he is doing is not harmful and therefore deserving of leniency" "His belief that he should be allowed to smoke marihuana shows	Burgeoning business

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
					contempt for a law made by Parliament"	
R v Turmel, 2001 QJ No 5875, 2002 RJQ 246, JE 2002-213	Male	Production and possession for the purpose of trafficking marijuana	Decision: the provisions of *CDSA* prohibiting the production and possession for the purpose of trafficking of marijuana are not contrary to section 7 of the Canadian Charter"	THC has therapeutic benefits Marijuana safe, not dangerous[d] Does induce violence or aggressiveness[d] No reported deaths from marijuana alone[d]	Harm principle Right to autonomy; justification of access for medical purposes (to self and buyers)	"it's immoral … to prohibit the medical use of marijuana"[d]
R v Lucas, 2002 BCJ No 1631, 2002 BCPC 268	Male 32	Possession for the purpose of trafficking marijuana	Absolute discharge	Prohibition against cultivating and possessing marijuana constituted an infringement … right[s] under section 7 of the Charter[b] Alleviate suffering of medical conditions Health risks to the user[b] Risk of harm to others caused by drivers impaired by marijuana[b] "risk of harm to others that is not insignificant nor trivial"[b] "degree of harm is neither insignificant nor trivial"[b] Medicinal properties "the drug clearly has value, and this value probably	Maintenance of a just, peaceful and safe society Gravity Denunciation Deterrence " while there is no doubt that Mr. Lucas offended against the law by providing marijuana to others, his actions were intended to ameliorate the suffering of others. His conduct did ameliorate the suffering of others. By this Court's analysis, Mr. Lucas enhanced other people's lives at minimal or no risk to society, although he did it outside any	-

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				outweighs the risks to the individual and the community"	legal framework. He provided that which the Government was unable to provide - a safe and high quality supply of marijuana to those needing it for medicinal purposes. He did this openly, and with reasonable safeguards. … This court hopes that cooler heads will prevail pending the final resolution of issues regarding the medical and non-medical use of marijuana"	
R v Clay, 2003 3 SCR 735, 2003 SCC 75, 2003 3 RCS 735, 2003 SCJ No 80, 2003 ACS no 80	Male 26[a]	Trafficking in cannabis sativa (Charter challenge)	Dismissed	Consumption of marihuana causes some harm[b,c] "not completely harmless"[b] "perhaps not as much harm as was first believed"[b] "use can have both harmful and beneficial effects"[b] "on some aspects of harm, 'the jury is still out'" [b] Harmful effects: bronchial pulmonary harm, risk of automobile accidents, possible precipitation of relapse in persons with schizophrenia, possible	Privacy Overbreadth Statutory interpretation	

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				negative effects on [the] immune system, possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant, possible long-term negative cognitive effects in long-term users, some evidence that some heavy users may develop a dependency[b] "reasoned apprehension of harm associated with marihuana use that was neither insignificant nor trivial"[b]		
R v Malmo-Levine; R v Caine 2003 3 SCR 571, 2003 SCC 74	2 Males	Caine: Possession of marijuana Malmo: Possession for the purpose of trafficking marijuana (Charter challenge)	Conviction upheld	Small proportion of people who use "share a particular vulnerability to its effects" Potential harm to others when person under effects engages in driving, flying and other activities involving complex machinery" "Chronic users may suffer 'serious' health problems Vulnerable groups at risk (adolescents with of poor school performance; possible impact on fetus/newborns; persons	Within the scope of criminal law is the "protection of vulnerable groups" "Advancing the protection of these and other vulnerable individuals through criminalization of the possession of marihuana is a policy choice that falls within the broad legislative scope conferred on Parliament. Equally, it is open to Parliament to	-

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				with pre-existing conditions such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies) "The record shows, and the trial judges found, that the prohibition of simple possession of marihuana attempts to prevent a low quantum of harm to society at a very high cost. A negligible burden on the health care and welfare systems, coupled with the many significant negative effects of the prohibition, do not amount to more than little or no reasoned risk of harm to society" "careful use can *mitigate* the harmful effects, but it is open to Parliament to proceed on the more reasonable assumption that psychoactive drugs will to some extent be misused" Dechamps (dissenting) "the moderate use of marihuana is on the whole harmless"	decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy." "Harm need not be shown to the court's satisfaction to be "serious and substantial" before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or not "insignificant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job" "While there is no constitutional threshold level of harm required before Parliament may use its broad criminal law power, conduct with little or no threat of harm is unlikely to qualify as a public health evil" "The harm or risk of harm to society caused by the prohibited conduct must outweigh any harm	

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				"the harm caused by prohibiting marihuana is fundamentally disproportionate to the problems that the state seeks to suppress. This harm far outweighs the benefits that the prohibition can bring"	that may result from enforcement" "The harm associated with marihuana use does not justify the state's decision to use imprisonment as a sanction against the prohibition of its possession" "Avoidance of harm is a 'state interest'" "The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana…and, through Parliament, the continuing view that its use should be deterred"	
R v Nicholls, 2003 BCPC 132	Male	Possession of marijuana	Dismissed	"marihuana poses a risk of harm to others that is not insignificant or trivial"[b] Therapeutic potential affirmed	Charter Section 15 Doctrine of issue estoppel Abuse of process	-
R v Normore, 2005 AJ No 543, 2005 ABQB 75, 386 AR 69	Male	Possession for the purpose of trafficking marijuana (Charter challenge)	Dismissed	"issues of public health and safety, both for the user as well as for those in the broader society affected by his or her conduct"	Malmo-Levine Charter Section 2(c) Charter Section 2(d) Charter Section 2(b) "criminalization of possession is a statement	

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				"reasoned apprehension of harm even if on some points "the jury is still out"[b] "while the use of marijuana is not as harmful as is sometimes claimed, marijuana is not a completely harmless drug for all individual users"[b] "Chronic users" " who pose a risk both to themselves and a potential cost to society"[b] "less serious and permanent effects than was once claimed"[b] "health effects can be harmful" Harm for "vulnerable groups"[b] may be "serious and substantial"[b] Risks of "psychotic breakdown" with respect to schizophrenia[d] Effects on memory, learning, and motivation[d] "Suspicious" correlation with depression and anxiety disorders[d] Potential long term effects on fetus[d] Increased risk for cancer[d]	of society's collective disapproval of the use of a psychoactive drug such as marihuana [and] the continuing view that its use should be deterred"b "even in the absence of proven harm the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle) or that causes harm only to the accused"b	

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				"significant health hazards"[d]		
R v Shaw, 2005 CCAN para 10,073, 2005 BCCA 380, 2005 BCJ No 1648, 214 BCAC 233, 199 CCC (3d) 93, 67 WCB (2d) 257, 2005 CarswellBC 1752	Male 38	Production and possession of marihuana	2 years' conditional sentence	Accused: "what I've learned since I've done this is that the crime is . . . that I've tried to prey upon the people that are down, that need to do drugs, that will steal from their friend, their neighbour, their mother, their child"	Parity with sentence given to spouse To mitigate future "risk of allowing the Crown to drive too hard a [plea] bargain for the waiver of jurisdiction"	"pernicious effects on our society" "breeds widespread crime and misery and, it appears, a troubling disdain for the law" "sophisticated marijuana grow operation" "to make a 'quick buck'" "deliberately preyed on vulnerable persons for profit"
R v Guilbride, 2006 BCJ No 2047, 2006 BCCA 392, 230 BCAC 128, 211 CCC (3d) 465, 145 CRR (2d) 91, 71 WCB (2d) 220	1 Female 6 Males	Conspiracy to import, importation, and possession for the purpose of trafficking cannabis resin	S Hately: 6 years Guilbride: 5 years Goyer: 4 years Thomson: 4 years Farrington: 3.5 years Thomson: 2.5 years J Hately: 2.5 years	Potential harm to marijuana users Acknowledges a "lessening" of the "belief that the use of cannabis products was seriously harmful and addictive, and that those who engaged in offences based on providing cannabis and cannabis resin to users were causing real social harm and profiting from the addictions of others"[b] "a recognition that cannabis is significantly less harmful than	General deterrence Specific deterrence Denunciation	"engaging in activities that provided illegal incomes instead of legal and taxable ones" "the newer scourge on the drug scene, ecstasy" "If a significant number of middle-aged, otherwise employable adults in British Columbia, or elsewhere in Canada for that matter, opted for engaging in

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				previously believed, and also very significantly less harmful than heroin, cocaine, or … ecstasy"[b] "illegal activity in relation to a substance that is illegal"[b] "when used by certain groups may cause identifiable harm"[b] "harm that would have resulted from its distribution" Potential harm "to be suffered by vulnerable persons" Harm to society from loss of taxation on the appellants' illegal income Harm to society from criminal activity related to drug trafficking Cannabis recognized as less harmful Acknowledging a "past prevailing view" that cannabis and cannabis resin were seriously harmful and addictive Current judicial endorsement of "harm caused by the use of marijuana"		activities that provided illegal incomes instead of legal and taxable ones, the quality of life in this province as we know it would substantially deteriorate" "these same accused all have families and children who no doubt rely on the state-funded health care and education systems, and will themselves look to the state for pension support in their old age"[b]

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				Marihuana not a 'harmless' drug[b] Serious and permanent effects of marihuana is less than previously claimed[b] Psychoactive and health effects can be harmful[b] Harms to vulnerable groups may be "serious and substantial"[b] "decreasing concern over the harm caused by its use"[b] "continuing debate about the extent of the harm associated with marijuana use"[b]		
R v Simpson, 2006 NSJ No 547, 2006 NSSC 404	Male	Possession of marihuana Possession for the purpose of trafficking cannabis resin Charter challenge (s.7)	Trial to follow	Applicant: No harm caused by producing and distributing free of charge cannabis resin oil for medicinal purposes; "substantial public good was being accomplished by his production and distribution" No aspect of evil intent, personal gain or harm Product substantially improves health of self and others "substantial public good"	Harm principle Charter s.7 Lack of evidence of serious or life-threatening medical conditions	-

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
Pearson v Canada (Minister of Justice), 2008 FC 1161	n/a	Use of cannabis as an essential element to a religious service (Charter challenge)	Claim struck	"it is argued that the absence of any harm in the possession and consumption of marijuana offends the principles of fundamental justice" "sacramental cannabis use" Marijuana is now available in instances of medical need "we do not think that the absence of proven harm creates the unqualified barrier to legislative action"[b] "the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused"[b]	Charter Section 7 Harm principle as per *Malmo-Levine*	
R v Agecoutay, 2008 SJ No 326, 2008 SKQB 171, 316 SaskR 281	3 Males 49, 52, 59	Possession of cannabis for the purpose of trafficking	L Agecoutay: 6 years' incarceration Girard: 5.5 years' incarceration R Agecoutay: 3.5 years' incarceration	Immeasurable harm upon society "Marihuana is spoken of as a soft drug and its use and distribution frequently attract lesser penalties. Yet reality is that its use and abuse has increased steadily over time. It has become almost	Gravity Responsibility Denunciation and deterrence "Society as a whole is concerned and angered about the financial and emotional price which the drug trade exacts…	Greed Reprehensible "indifferent to the harm they would inflict" "carefully and meticulously planned and carried out their project so as to obtain maximum production

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				commonplace. While it may not cause the same immediate harm as some other drugs, it does exact a certain toll, particularly through continued use. This is especially so with our young people, including even adolescents."	the conduct must be strongly denounced" Gladue	and immense personal gain"
R v Caldwell, 2008 NSJ No 83, 2008 NSSC 67, 263 NSR (2d) 182, 77 WCB (2d) 741	Male	Production for the purpose of trafficking cannabis marihuana (Charter challenge)	Dismissed	Physician support for therapeutic use of cannabis for various medical conditions	Charter Section 7 Harm principle	-
R v Song, 2009 OJ No 5319, 2009 ONCA 896, 249 CCC (3d) 289, 257 OAC 221, 100 OR (3d) 23	Male	Producing marijuana	Conditional sentence of 12 months, followed by 3 years' probation; decision that the sentence should have been incarceration	Trial judge: "The really important factors in this case are that this is the least harmful drug covered by the Controlled Drugs and Substances Act. The Supreme Court of Canada had to basically ignore the harm principle, the John Stewart Mill fundamental principle of criminal law in order to uphold these laws"	Deterrence – "the trial judge refused to take into account the principle of deterrence, stating that it had proven to be ineffective in the context of drug offences" Trial judge argued: "nobody has been deterred. People have been going to jail for drug offences for -- for a couple of generations now and the drug -- the drug plague is worse than it ever was."	Drug plague

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
					Jurisprudence	
R v Cook, 2010 ONSC 5016	Male 43	Attempt to possess for the purpose of trafficking; Possession of cannabis marihuana	4 years' incarceration for drug related charges (5 years' and 8 months' incarceration total)	"harm to society, occasioned by the drug trade cannot be gainsayed"[b] Extremely dangerous[b] Potential to cause a great deal of harm to individuals and to society[b] Socially destructive[b] Deleterious effects[b] Danger to the community[b]	Deterrence Denunciation Breach of trust	Insidious Greed Blight Perils "prepared to do significant damage to others so that they could make money"[b] Highly lucrative
British Columbia (Director of Civil Forfeiture) v Wolff, 2012 BCJ No 2420, 2012 BCCA 473, 330 BCAC 161, 357 DLR (4th) 437, 297 CCC (3d) 391, 2012 CarswellBC 3628, 221 ACWS (3d) 337	Male 51	Forfeiture of property related to sentence of possession for purpose of trafficking marijuana	Appeal dismissed; no forfeiture required	Costs to the provincial healthcare and legal systems attributable to marijuana use in 2005, as well as productivity losses totalled approximately $140.6 million[d] "the total value of the marijuana industry in the province [is] $1.2 billion"[d]	Consideration of "diffuse harms" suffered by society as a whole Proportionality and fairness: accused to be held liable for harm emanating from individual actions, not for the "actions of others ..."[b] Forfeiture to be compensatory, not punitive Interest of justice	-
R v Tran, 2016 OJ No 2568, 2016 ONSC 3225	4 Males 27, 28, 33, 34	Various charges related to: Conspiracy to traffic marijuana Trafficking marijuana	15 month to 2 years, consecutive sentences	Indirectly related grow operation cases: dangers caused by hydro bypasses in residential settings;	General deterrence and denunciation "conscious choice to engage in this illegal activity to make	Lucrative profits[b]

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				violence; threats of violence[b]	substantial amounts of money and without regard to the harm to society and individuals … deserving of condemnation by the public"[b]	
R v Nguyen, 2017 BCJ No 1792, 2017 BCPC 261	Male 50	Possession for the purpose of trafficking marijuana	Declined 1.5 years incarceration	"deleterious effects"[b] Marijuana grow operation in a residential neighbourhood creates a "potential public safety hazard" Increases risk of electrical fires and harm to the house and potentially to neighbours[d] Electricity diverted and not paid for[d] Increased criminal activity in residential neighborhoods Increased presence of weapons and traps "accompanied by violence and danger to innocent citizens"[b] Serious social problems[b] "attract other illegal activities and dangerous consequences to the community"[b] Serious health and public safety hazards	Charter Section 1 Charter Section 12 Mandatory minimum sentencing Impact of crime on the community Potential public safety hazards Deterrence Denunciation Rational connection Minimal impairment Proportionality of the legislation	"blight in our society"[b] "Marijuana production requires planning, capital outlay and financial investment … a deliberate choice to break the law, for personal gain" Pervasive[b] Lucrative business[b] "vile and destructive consequences"[b] Pernicious

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
				Clean up problems Endanger the lives and health of whole communities		
R v Murphy, 2021 NJ No 8, 2021 NLCA 3, 398 CCC (3d) 354	Male 26[a]	Possession for the purpose of trafficking cannabis	Dismissed (with dissenting opinion) Suspended sentence and 2 years' probation	"society's values towards cannabis had changed" "the Cannabis Act does not suggest that cannabis is without inherent harm"	Decision that with the introduction of the *Cannabis Act*, "principles of general deterrence and denunciation, while still relevant, now had less prominence" Gravity Parity Exceptional circumstances	

APPENDIX C: Summary of Cases Reviewed Pertaining to Cocaine, Opioids, and/or Methamphetamine

[a] Age at time of offence
[b] Citing another case
[c] Citing a secondary source
[d] Expert witness

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
R v Roufosse, 2001 NWTJ 6	Male 25 (24[a])	Trafficking cocaine; Conspiracy to traffic in cocaine	4 years' incarceration	"negative effects felt throughout the community" "potentially dangerous consequences" "does very real harm to society" "dangerousness" "powerful and potentially lethal" "highly profitable" "known risks to vulnerable addicts" "the lure of cocaine to young people who choose the thrill of it for the first time over common sense" "People get hurt" "spin-off in other criminal activity"	"Cocaine traffickers and those who are thinking of becoming traffickers either as a career or as a form of illegal moonlighting must be stopped. Our families, and the community as a whole, have too much to lose" "Traffickers of cocaine ply their trade at the risk of a major loss of freedom. That message must not be diluted. It must remain clear. It must remain certain. It must remain consistent" "Problems happen in life. Law-abiding people, those who care about themselves and about the community, don't do what you did"	"the customers in Yellowknife who buy cocaine tend to be … in vulnerable circumstances" "A large amount of money stands to be made with minimal effort" People "who recklessly engage in such destructive activity are greedy and callous" "selfish need to make quick money" "social predators" "care little or not at all about the harm they are potentially seeding in the community" "They care about themselves" "They tend to have no interest in, nor

					"the incidence of cocaine cases is far greater than it used to be" "the need to discourage you, to discourage others, and to reflect the disapproval of the vast majority of right-minded people" "to impress upon you that when you go back downstairs, you take with you the message that you must never take up again with that crowd" "The need for specific deterrence does have some weight even though it is probable Mr. Roufosse will not want to take up that sort of activity again"	sympathy for, the results of the poisonous distribution of a dangerous drug" "This was a commercial operation … it was a money-making mission"
R v Deflorimonte, 2005 OJ 6182	Male	Trafficking in cocaine	13 months' incarceration (reduced from 22 months' due to guilty plea); 2 years' probation	harm to society at large[b] Use and sale of cocaine kills and harms, both directly and indirectly[b] Health effects[b] Sale and use strongly associated with violent crime[b] Importation inevitably begets violent acts[b] "variance in the degree of danger that the court's feel that it imposes to the individual and to society"	Deterrence Protection of the public "General deterrence outweighs the interest of the individual offender and the principles of rehabilitation" "If those who deal in dangerous drugs realize the courts will pass severe sentences, they will be less inclined to indulgence in this	-

				"one of the most dangerous drugs in existence, encouraging tranquil users to violence upon the slightest provocation"[b] "cocaine was at least as dangerous [as heroin] for society as a drug of abuse"[b] "More recently … the courts have adopted a different position … powdered cocaine is much less dangerous than heroin, although much more dangerous than marijuana and hashish, but that crack cocaine is much more dangerous than powdered cocaine and approaches heroin in terms of dangerousness" Harmful substance	dangerous and miserable trade"[b] Rehabilitation	
R v Millar, 2005 BCJ No 2514, 2005 BCSC 1571	Male	Trafficking cocaine (also firearms offences)	2 years' less a day incarceration; followed by 2 years' probation (for all charges)	Dangerous Harmful "harm to society occasioned by the drug trade cannot be gainsayed"[b]	Denunciation General and specific deterrence Rehabilitation	Greed
R v Grant, 2007 MJ No 193, 2007 MBQB 135, 216 ManR (2d) 219	Male 33	Trafficking crystal methamphetamine and cocaine; other related charges	12 years' incarceration for drug related charges	Social harm to individuals and society in general Methamphetamine more addictive and less susceptible to treatment than cocaine or heroin[d]	General deterrence Parity Moral culpability Rehabilitation "How does one finely weigh [harms between	"scourge on society" Greed Evil "committed by persons with no conscience"

				"there is no longer a logical sentencing distinction between persons who traffic in heroin, cocaine or methamphetamine. All are dangerous drugs" Social problems [from methamphetamine] are equal to or exceed those caused by the consumption of crack cocaine" "Although crystal methamphetamine may generate a greater dependency than crack cocaine, both are highly addictive. When performing a harm assessment, crack cocaine may still be more popular and available than crystal methamphetamine and thus serve quantitatively as a greater risk to individuals and society" "It is difficult, if not impossible, for a court to objectively calculate the relative harm that each drug inflicts upon their victims and society"	methamphetamine and crack cocaine] and balance such an evil? In my view, it is unseemly to attempt to do so. Both should simply be treated as dangerous drugs that attract a high level of deterrence"	
R v Burke, 2008 PESCTD 11	Female 23	Trafficking in cocaine and ecstasy; Possession of cocaine and ecstasy	42 months' incarceration	Cocaine: highly addictive; necessarily involves illegal chain of cultivation, production, transportation	"Trafficking especially should be denounced as a horrible crime against people and society"	"many unfortunate addicts" "in my view trafficking in large quantities of highly

					"Traffickers of illegal drugs, especially highly addictive drugs like cocaine, should be severely punished so as to deter them and other persons from taking part in this horrible destructive enterprise" Mercy: "It is difficult to consider mercy for a drug trafficker who makes a lot of money victimizing and destroying others and harming society… It was your decision to be a big time criminal drug pusher, put your children in physical danger in a drug trafficker home…I suspect your trafficking drugs, as suggested by the evidence of a drug enterprise, has already harmed many people, indeed ruined peoples' lives. Now you are responsible for three more victims, your own children"	addictive illegal drugs such as cocaine is one of the most heinous of all crimes"
R v Kayode, 2008 OJ 4884	Male	Possession for the purposes of trafficking crack cocaine (also firearms offences)	Acquitted	Harmful effects on users	Reasonable doubt	"wrecks untold harm on society"

R v Sidhu, 2008 OJ 3479	Male 21	Importing heroin	8 years' incarceration	Overdose Risk of contracting HIV and other blood borne infections Shame Violence an inherent part of drug trafficking Death Murders	Denunciation and deterrence Moral blameworthiness Youthful first time offended Imprisonment to be as short as possible and tailored to the individual To "adequately articulate the public's disapproval" Potential for a long sentence "may be so onerous that a person of his age, education and experience might potentially come out of jail more damaged than when he entered"	"deadly and devastating drug that ravages lives"[b] "untold misery and grief"[b] Insidious[b] Greed Epidemic[b] "tears at the very fabric of society"[b] "guilt for the innumerable serious crimes of all sort committed by addicts in order to feed their demand for drugs"[b]
R v Schmok, 2009 BCJ No 1351 2009 BCSC 929	Male 23	Possession for the purpose of trafficking cocaine	2 years' incarceration; 1 year probation	"The destructive potential of these drugs [cocaine; heroin] is so well known as not to require comment"[b] "the harm to society generally is well recognized"	General deterrence and denunciation Rehabilitation	"motivated by greed"
R v Switucka, 2009 SJ No 598, 2009 SKQB 372, 342 SaskR 316	Male 28	Possession for the purpose of trafficking cocaine	3 years' imprisonment	"extensive societal harm"[b]	Gravity of offence (amount of cocaine) Deterrence from reoffending	Greed Monetary personal gain
R v Williams, 2010 OJ 2971	Male 26	Possession for the purpose of trafficking crack cocaine Trafficking crack cocaine	Concurrent terms of 9 months' incarceration, followed by one year of probation	Drug use causing "harm to individuals and society"[b] "harm to society, occasioned by the drug	Denunciation General deterrence Pleading not guilty not indicative of remorse or	Dangerous and insidious[b] "blight in our society"[b]

				trade cannot be gainsayed"[b]	public acceptance of criminal responsibility	
R v Bacchus, 2011 OJ No 5800, 2011 ONSC 7531	Male 22 (19[a])	Possession for the purpose of trafficking cocaine	14 months' incarceration; followed by 1.5 years' probation	Dangerous[b] Potential to cause harm to individuals and to society[b] Immeasurable harm to society[b]	Denunciation Specific deterrence Rehabilitation	Insidious Peril "drugs are a destructive force in society" "anyone who engages in the drug trade spreads misery"
R v Berry, 2011 OJ No 3551, 2011 ONSC 8016, 97 WCB (2d) 313, 2011 CarswellOnt 7708	Male 61	Possession for the purpose of trafficking cocaine and marihuana	3 years' incarceration	Enormous harm to society Criminal activity, often violent[b] Direct costs to health care and law enforcement[b] Indirect costs of lost productivity[b] Cost to society estimated at $18.45 billion annually[b,c] In 1992: 732 deaths, 7,095 hospitalizations, 58,571 hospital days in Canada attributable to illicit drugs[b,c] Mortality from illicit drugs is less than for alcohol and tobacco, but tends to involve younger victims[b,c] Vulnerability of children and young people Substantial harm	Rehabilitation ("criminal lifestyle") Specific deterrence General deterrence Denunciation Protecting the community "separating and removing Mr. Berry from society for a period of time"	Insidious "sophisticated trafficking operation for profit" "career criminal" "Career choices have consequences" Tragic consequences[b] Grave concern[b] Devastating effects[b]
R v Potts, 2011 BCJ No 38, 2011 BCCA 9, 298 BCAC 185, 266 CCC (3d)	Male	Trafficking cocaine; conspiracy to produce and traffic methamphetamine	5 years' incarceration	Dangerous Highly-addictive "users":[b] - often permanently harmed	Gravity Deterrence and denunciation State misconduct	"true scourge"[b] "tragedy for the people"[b] Greed

279, 2011 CarswellBC 37, 92 WCB (2d) 812				- often become less or non-productive members of society - caught in a downward spiral of addiction - require additional health care. - require medical and psychiatric treatment - need financial and emotional support from their families and their communities - many remain unsuccessful in overcoming their addictions	"insofar as courts are able to impose sentences that denounce and deter the increased use and distribution of methamphetamine, in my view they must do so. To do otherwise is to fail to appreciate the harm that these substances cause to the basic health and life of the people in the community..."[b] "Drug addiction is a serious problem and encouragement of such addictions can be said to be contrary to society's shared values and concerns. This is why Mr. Potts has been charged and is being sentenced for his crimes, to reflect society's condemnation of his actions."[b]	"a despicable endeavour which causes very substantial harm within society"
R v Massey, 2012 BCJ No 1465, 2012 BCSC 935, 2012 CarswellBC 2067	Male 45	Possession for the purpose of trafficking cocaine (and other related charges)	5 years' incarceration for drug related charges	Societal damage[b] Connection between heavy drug use and crimes[b] Effects impact users and society[b] "harm to society…cannot be gainsayed"[b] Contributes to other offences[b] Potential for health and economic consequences[b]	Deterrence Proportionality Denunciation	Dangerous and insidious[b] Pernicious[b] "blight in our society" Large commercial enterprise Devastating[b] Ravages lives[b] Deadly[b] Notorious[b]

						Grave concern[b] Lucrative[b] "[the offender's] role in spreading this 'disease'"
R v Oraha, 2012 OJ No 973, 2012 ONSC 1439, 2012 CarswellOnt 2951	Male 25[a]	Possession for the purpose of trafficking cocaine, methamphetamine, and MDMA; Conspiracy to traffic cocaine	9 years' incarceration	"The harm caused by cocaine is never isolated to its users, because its users do not live in isolation. Friends and family members of cocaine users will inevitably be harmed by its insidious effects. Society as a whole suffers as well" Costs: health care, law enforcement, lost productivity"[b] Associated with violent crime[b] Danger to human life	Denunciation Deterrence Rehabilitation	Destructive Heinous Insidious Greed "significant and often tragic consequences" "grave concern" "real threat of cocaine use and distribution to the maintenance of our just, peaceful, and safe society"
R v Shusterman, BCJ No 484, 2012 BCSC 362, 2012 CarswellBC 2401	Male 25 (22[a])	Possession for the purpose of trafficking cocaine	1 year incarceration	Highly addictive drug Associated with consequential criminality "established connection between heavy drug use and crimes motivated by the need to finance a drug habit"[b] "often-fatal gun violence that is associated with this drug"[b] "contributes to a variety of other offences"[b] "potential for extremely serious health and economic consequences"[b]	Range (jurisprudence)	Dangerous and insidious[b] Pernicious[b] "a blight in our society"[b] "tragic consequences"[b] "societal damage caused by [cocaine] is notorious"[b] Grave concern[b]

				Socially destructive[b]		
R v Beaven, 2013 SJ No 180, 2013 SKQB 91, 415 SaskR 279	Male	Trafficking cocaine in association with a criminal organization Conspiracy to traffic cocaine	6 years' incarceration	"extensive societal harm"[b] "harm to society is extensive and far-reaching"	Corrections and 2013 SKQB 91 (CanLII) Conditional Release Act, S.C. 1992, c.20 Society's denunciation Specific and general deterrence Parity	"social scourge" Devastation "commercially motivated venture" "elaborate and extensive commercial scale" "grave offense" "a problem to be reckoned with in this community"[b] "constantly exposed to the social scourge and devastation"[b]
R v Hassall, 2013 BCJ No 1680, 2013 BCSC 1391, 2013 CarswellBC 2341	Male 61	Possession for the purpose of trafficking cocaine	2 years' less a day conditional sentence	Cocaine "causes serious harm to society"	Gravity Deterrence and denunciation Rehabilitation	Profit
R v Leitner, 2013 SJ No 15, 2013 SKQB 1, 411 Sask.R. 79, 2013 CarswellSask 20	Male 22[a]	Trafficking cocaine	14 months' incarceration	Societal harm	Deterrence and denunciation Proportionality	-
R v Marshall, 2013 OJ No 4494, 2013 ONSC 6206, 2013 CarswellOnt 13817	Male 23	Possession for the purposes of trafficking cocaine (also firearms offence)	1 year incarceration for drug related offence	Addictive Harm to society	Denunciation and deterrence	"rather than being gainfully employed, Mr. Marshall chooses to sell drugs to support himself and his drug habit"

R v Rider, 2013 MJ No 165, 2013 MBQB 116, 292 ManR (2d) 174	Male 21	Possession for the purpose of trafficking cocaine Operating a stash house Firearm offences	86 months' imprisonment for the drug offence	Crown: "clear danger to a peaceful and safe society" "Its victims are legion: addicts, their families, casualties of violent and property crimes related to cocaine, and ultimately taxpayers who pay for the human and social carnage that the avarice of traffickers produces"	Denunciation and deterrence as primary objectives "highly commercial and ongoing drug trafficking syndicate" "premeditated, long-standing, and commercially motivated" "The harm to society of these offences is immense as well as deeply offensive to society's norms" RE Gladue: "The criminal activity in question is serious, re-occurring, and premeditated. These are sober crimes requiring calculation, resourcefulness, and ruthlessness" Prospect of rehabilitation	Greed Financial benefit "methodically planned and ongoing business"[b] "very deliberate choice to lead a criminal lifestyle"[b] "prey upon and exploit the most vulnerable members of our society for profit" "social carnage"
R v Vezina A.L. (Private), 2013 CM 3015	Female 22	Trafficking cocaine	6 months incarceration	"immeasurable harm to society"[b]	Imprisonment as last resort, as per the Supreme Court and Court Martial Appeal Court in Baptista, 2006 CMAC 1[b] Citing *R v Dominie*, 2002 CMAC 8: "Trafficking in crack cocaine on numerous occasions, even though it is non-commercial in	-

					nature, generally requires the imposition of actual imprisonment … general deterrence requires that the military know that they will be imprisoned if they deal in crack cocaine on military bases"[b]	
R v Jason De Giorgio, 2014 OJ No 912 2014 ONSC 1274	Male 30	Possession for the purpose of trafficking crack cocaine	21 months' incarceration; followed by 1.5 years' probation	Extremely dangerous "potential to cause a great deal of harm to individuals and to society"[b] Immeasurable harm it causes society[b]	Deterrence and denunciation Rehabilitation	Insidious Perils
R v Fleming, 2014 BCJ No 2454, 2014 BCPC 220, 2014 CarswellBC 2908	Male	Possession for the purpose of trafficking cannabis marihuana and crystal methamphetamine; Breach of trust	3 years', 6 months' incarceration (for drug related charges)	Harmful to society "turned loose into the population of a prison … presents considerable problems" "Inmates who have drugs to traffic have a form of wealth. It can be used to create debts that must be paid back either in services or on the street. Inside, it can buy enforcers and protection for the inmate drug trafficker. Outside it can create debts that family members may be called upon to pay"[b] "In the close quarters of a penal institution drug use lends itself to increased violence" toward inmates and staff[b]	Gravity Deterrence Severity of offence Egregious breach of trust	Profit motive

				Impedes recovery for inmates with "drug addiction," as "those individuals are sent to institutions in the hope that a structured rehabilitation will help them to better their lives" Prisons are expected to be a "a drug free environment" and "society pays for failed rehabilitation"[b] Death by drug overdose[b] Danger to inmates and staff[b] Violence[b] Commodity used by inmates to influence power and control over others[b] Serious assaults[b]		
R v Jordan, 2014 BCJ No 2499, 2014 BCSC 1887, 2014 CarswellBC 2961	Male 50	Possession for the purpose of trafficking cocaine	1 year incarceration	Harm to society "cannot be gainsayed"[b] Damage to the community[b] Contributes to Potential for health and economic consequences[b] Potential to cause harm to individuals and to society[b]	Gravity Protection of the public Rehabilitation Citing *R v Hansen*, 2012 BCCA 142: "the sentencing judge stated: 'I know [the sentence I am imposing] does not emphasize the rehabilitation of Mr. Hansen, but Mr. Hansen will either choose or not choose to use [drugs], and that is his choice.'	Insidious[b] "blight in our society"[b] Disastrous[b] Greed,[b] profit, or personal gain "[the offender's] role in spreading this 'disease'"[b] Socially destructive[b] Deleterious[b]

					I am unable to agree with this characterization of the process of the potential rehabilitation of an individual addicted to drugs. Drug addiction is an illness. For an addict, using drugs is not a simple "choice" to be either made or not made, but an illness 'characterized by a loss of control over the need to consume the substance to which the addiction relates'… not a simple matter of 'choice' for those afflicted" Gap principle Couriers: "generally recognized as sympathetic and vulnerable individuals" General deterrence	
R v Yoshikawa, 2014 AJ No 491, 2014 ABQB 163, 583 AR 201	Male 30[a]	Possession for the purpose of trafficking cocaine	2 years' incarceration	"it cripples many, and spawns other serious crime"[b] Among "the most dangerous drugs and narcotics"[b]	Communicate society's condemnation Deter accused from committed future offences Moral blameworthiness	"greed-driven and nothing else"
R v Ceballos, 2015 OJ No 536, 2015 ONSC 720, 2015 CarswellOnt	Male 40 (36[a])	Possession for the purpose of trafficking cocaine	2.5 years' less a day incarceration	Immeasurable harm to society[b] Immense direct and indirect social and economic harm throughout communities[b]	Rehabilitation Denunciation and deterrence Gravity Degree of responsibility	

1315, 119 WCB (2d) 106				Use and sale "kills and harms"[b] "Enormous and disastrous" adverse health effects[b] Sale and use associated with violent crime[b]		
R v Comer, 2015 AJ No 795, 2015 ABPC 140	Male 19[a]	Trafficking in heroin	2 years' incarceration	"difficult to identify the far- reaching harm done to victims or the community"	Reparation Rehabilitation "An addicted offender is not only the guilty person but also the victim" Proportionality Parity	Insidious "trail of dismay and destruction"
R v Feser, 2015 AJ No 1376, 2015 ABQB 786	Male 31	Trafficking methylenedioxyamphetamine (MDA); Producing methylenedioxyamphetamine (MDA); Possession, production, or importation of Red Phosphorus, knowing that it would be used to produce methamphetamine; Attempt to produce fentanyl	5 years' incarceration	Harm or potential harm done or to be inflicted on customer "dangers of fentanyl non-medical use are extreme and exceed the dangers from heroin use"	Proportionality Gravity Parity	Commercial nature
R v Gambilla, 2015 ABQB 571	Male Female	Importation of cocaine; Possession for the purpose of trafficking cocaine	Mr. Gambilla: 6.5 years' incarceration Ms. Mamouni: 4.5 years' incarceration	Highly addictive and dangerous[b] Harmful effect on society[b]	Gravity "importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their	Insidious[b] "wreaks havoc"[b] Breed other crime[b] Importation at root of social devastation[b] "responsible for the gradual but inexorable

					demand for drugs. Such persons [should] serve long periods of penal servitude"[b] Parity Planning and deliberation Denunciation and deterrence: "this focus on rehabilitation and treatment cannot sweep off the sentencing table the legitimate sentencing objectives of denunciation and deterrence, both specific and general"[b] Moral culpability	degeneration of many of their fellow human beings as a result of their becoming drug addicts"[b] "hardship cast upon their victims and their families"[b] "cold-blooded non-users" [b]
R v Johnson, 2015 OJ No 2819, 2015 ONSC 80	Male 28 (26*)	Trafficking cocaine (4 counts)	1.5 years' imprisonment served conditionally; 90 days imprisonment, served intermittently Fridays at 8:00 p.m. until Monday 6:00 a.m.	Harm to society "cannot be gainsayed"[b] "damage to the community"[b] Contributes to a variety of other offences[b] Health and economic consequences[b] Crack cocaine as extremely dangerous Potential to cause "extraordinary damage"[b] Potential to harm to individuals and society[b] Highly addictive[b]	General deterrence Extensive volunteer work with "at-risk and troubled youth [about] the moral and legal wrongness of involvement in drug trafficking"	Insidious[b] "blight in our society"[b] "[the offender's] role in spreading this 'disease'"[b] Deleterious effects[b]
R v Krause, 2015 BCJ No	Male 24[a]	Trafficking cocaine	Suspended sentence; 2 years' probation	Harmful effects[b]	Deterrence Denunciation Rehabilitation	"wreak destruction to the individuals that

3105, 2015 BCPC 305					Exceptional circumstances (satisfied) "To send him to prison now would do more harm than good and the public protection would be better served by a non-custodial sentence"	use them and to our community"[b] "evils of trafficking"
R v Legerton, 2015 AJ No 456, 2015 ABQB 268, 604 AR 373	Male 28	Importation of cocaine	4 years' incarceration	Highly addictive[b] Dangerous[b] Harmful effect on society[b]	Gravity Planning and deliberation Degree of responsibility Wilful blindness Moral blameworthiness Denunciation	Profit and greed[b] "complete disregard for the human misery"[b] "cold blooded mercenary business"[b] Insidious[b] Breeds other crime[b] Wreaks havoc[b] "easy money" Abhorrence[b] Importation at "root of the social devastation"[b] "responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drug addicts"[b] "hardship cast upon their victims and their families"[b] "guilt for the innumerable serious crimes of all sorts committed by addicts

						in order to feed their demand for drugs"[b] "cold-blooded non-users"[b]
R v Reid, 2015 NSJ No 405, 2015 NSSC 276, 365 NSR (2d) 90	Female 35	Trafficking hydromorphone and crimes related to theft and possession of narcotics	30 months incarceration	Potent and dangerous	Proportionality "extreme violation in breach of a position of trust" Principles of totality and restraint Rehabilitation Parity	-
R v Abude, 2016 BCJ No 592, BCSC 543	Male 25	Trafficking in cocaine	6 months' less a day imprisonment	"wrong and harmful" Harm to society Harmful drug	"to express society's denunciation of this crime and to deter you and others from committing similar drug offences" Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 36 and 64	-
R v Andrews, 2016 OJ No 5563, 2016 ONSC 5475	Male 35	Possession for the purpose of trafficking cocaine, marijuana, and psilocybin	4 years' incarceration	Immeasurable harm "to the fabric of our society"[b]	Rehabilitation Gravity Responsibility	"selling drugs for financial gain" "It is a poison that wreaks havoc on the lives of addicts, their families and the community at large"
R v Derycke, 2016 BCJ No 2053, 2016 BCPC 291	Male 23	Possession for the purpose of trafficking heroin, cocaine, fentanyl and marihuana	1 year incarceration; 3 months' probation	Tremendous harm to the public Overdose deaths Public health emergency	General and specific deterrence "drug traffickers cannot be wilfully blind to the nature and consequences of the drugs they are selling"	Scourge Devastation

R v Malt, 2016 BCJ No 2192, 2016 BCPC 322	Male 28	Possession for the purposes of trafficking cocaine	1 year incarceration; followed by 1 year probation	"harmful effects"[b] Health care and law enforcement costs[b] Lost productivity[b] Cost to society of substance abuse estimated a $18.45 billion annually[b,c] Impacts younger "victims"[b,c] "Mortality from illicit drugs is less than for alcohol and tobacco"[b,c]	Denunciation Deterrence	Greed: "He did not want to legally earn the money" Insidious[b] Infiltrate communities[b] "wreak destruction" to individuals and our communities[b] "distribute poison" "contribute the destruction of lives" Cause "tremendous damage to our social systems" "tragic consequences"[b] "grave concern"[b]
R v Sawh, 2016 OJ No 6768, 2016 ONSC 7797, 370 CRR (2d) 235	Male 52	Trafficking cocaine The defence sought an order declaring that s. 742.1(c) is inconsistent with both s. 7 and s. 12 of the Charter, and that it is of no force and effect pursuant to s. 52(1) of the Constitution Act, 1982 (dismissed)	90 days imprisonment, served intermittently Fridays at 8:00 p.m. until Monday 6:00 a.m.; followed by 2 years' probation Was on bail with curfew for on bail for over 3.5 years	"potential to cause a great deal of harm to individuals and to society"[b] "The harm to society, occasioned by the drug trade cannot be gainsayed"[b] "The damage to the community from trafficking in cocaine is substantial, and extends well beyond the offender and his prospective customers ... it contributes to a variety of other offences"[b] "potential for extremely serious health and economic consequences"[b]	Test for Infringement of s. 12 (1) public safety and security; (2) deterrence and denunciation; and (3) coherence and consistency Exceptional circumstances (satisfied) Medical needs of accused and support needs of his elderly mother	Dangerous and insidious "a blight in our society"

				"socially destructive"[b] "deleterious effects"[b]		
R v Sihota, 2016 BCJ No 2696, 2016 BCPC 410	Male 35	Possession for the purpose of trafficking heroin	6 months incarceration; 1.5 years probation	"Many lives were ruined by the drugs sold by Mr. Sihota" Rate of overdose increasing exponentially	"primary objective of sentencing in cases of narcotics trafficking must be to do whatever can be done to stop or reduce the incidence of the offence" "the importance of denunciation and deterrence outweighs that of rehabilitation" "[the accused] could not be described as a self-sufficient adult citizen. He remains at high risk to relapse and reoffend"	"Consequences are tragic" "narcotics trafficking is epidemic" "victims of drug trafficking are also worthy of compassion"
R v Alcantara, 2017 AJ No 134, 2017 ABCA 56, 136 WCB (2d) 500, 47 Alta LR (6th) 71, 2017 CarswellAlta 215, 353 CCC (3d) 254	2 Males	Drug conspiracy; criminal organisation	15 years' incarceration	"harm to the community of Fort McMurray, to the people within the community, to others who become involved in the drug trade, and, in particular, to the vulnerable people who become addicted to cocaine and whose lives are ruined" Damaging, destabilizing, and scarring of a community Reducing social cohesion	Denunciation and deterrence Gravity Responsibility "signal the fact that this province will not be in any sense other than a hostile environment for this sort of crime" "The law must unambiguously respond in order to make the criminal cost-benefit analysis sufficiently deterring on the "cost" side."	Greed Condemnation "parasitic profit-making" Heinous trade Callously "planned, deliberate and exceedingly harmful form of enterprise" "the extraction of money from damaged and afflicted people" Customers "trapped by their addictions"
R v Babineau, 2017 OJ No	Male	Possession for the purpose of trafficking	1.5 years' incarceration; followed by 2	"destructive" and "devastating" effects "on those who abuse it and on	"Denunciation … with the ultimate goal being to deter like-minded	"scourge on the community"[b]

7255, 2017 ONSC 4872		cocaine and oxycodone	years' probation (abstain from using drugs)	the friends and family of users and the community"[b] Trafficking "multiplies the destructive effects and introduces harm to society"[b] Addictive[b] Dangerous[b] Crimes committed to finance dependencies[b] Dangers and harm to society "Oxycodone is considered to be a dangerous drug rivalling heroin" "serious danger to Canadian society"	individuals from trafficking in drugs"[b] Deterrence Rehabilitation	"havoc and destruction"[b]
R v Begon, BCJ No 862, 2017 BCSC 757 (Re: Cederfeldt)	Male 29	Possession for the purpose of trafficking heroin, cocaine, and methamphetamine	15 months' incarceration; followed by 1.5 years' probation	"brings about harm and it does so to innocent persons"[b] "can cause permanent damage of a serious nature"[b]	Denunciation and deterrence	"drug trafficking has no redeeming social features"[b]
R v Carter, 2017 SJ No 108, 2017 SKQB 74	Female 53	Possession for the purpose of trafficking cocaine	1.5 years' incarceration	Extensive societal harm associated with distribution and consumption	Denunciation and deterrence Personal circumstances	Grave offence
R v Fitzpatrick, BCJ No 2192, 2017 BCPC 319	Female 25	Possession for the purpose of trafficking cocaine	4 months' incarceration	"the victims are really members of the public who are drug addicted and who are seeking easy access to feed their habit"	Exceptional circumstances (satisfied): "desperation and vulnerability" Gladue	Insidious
R v Frazer, 2017 AJ No 500, 2017 ABPC 116, 58	Male 36	Trafficking fentanyl	3 years' incarceration	"fentanyl is even more dangerous than heroin" "the most efficient killer of drug users on the market today"	Denunciation and deterrence Gravity Responsibility Proportionality	"death and destruction wrought by the scourge" "ripples of tragedy"

Alta. L.R. (6th) 185				Increasing population rates of death[b,c] Lowers and can stop breathing[b,c] Potentially destructive, addictive, and lethal[b,c] High abuse potential[b,c] Unpredictable quality in illicit market[b,c] Low 'margin of error' with dosage[b,c] Public health crisis[b] Used to treat severe pain[b,c] Useful medical drug when use is controlled[b,c]	Protection of the public Moral culpability Rehabilitation "the more dangerous or harmful the substance, the higher the sentence that could be expected to be imposed" Deterrence: "Trafficking in the drug [cocaine] must be deterred … It is our duty to deter people from using it and from trafficking in it. is and remains the most important element in the sentencing process … It calls for imprisonment and not for a short, nominal term"[b] "Fentanyl traffickers in Alberta can expect severe sentences"[b]	"insidious and insatiable monster" "Trafficking in fentanyl is almost the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette" "he has joined the front line of spreading those terrors and tragedies to others" "many of these people will not survive their addiction to fentanyl"
R v Hendrickson, 2017 BCJ No 178, 2017 BCSC 176	Male 24 Female (acquitted separately)	Possession for the purpose of trafficking cocaine and marihuana	6 months' incarceration; followed by 1.5 years' probation	"harmful nature of cocaine in the community" Crisis	Denunciation and deterrence "you must account for your illegal activity"	"scourge on our society"
R v Malenovic, 2017 BCJ No 1886, 2017 BCPC 274	Male 22 (20[a])	Possession for the purposes of trafficking cocaine, fentanyl, and heroin	6 months' incarceration; followed by 1 year probation	Fentanyl as more potent than morphine and heroin Unpredictable dosage when mixed with other drugs increases danger Overdose Death	Ranges of previous cases Exceptional circumstances	Insidious "havoc it wreaks on society"

				Disguising as oxycodone poses risk to users "accidental overdoses" "inherent risk"		
R v Payne, 2017 NJ 306	Male 46	Possession of cocaine	Absolute discharge	"Those who provide a market for such a serious drug contribute to the personal and societal harm caused by the sale and distribution of such substances even if the possession is for personal use"	Rehabilitation	-
R v Cormier, 2018 NBJ No 150, 2018 NBCA 38, 2018 AN-B no 150, 366 CCC (3d) 1, 2018 CarswellNB 266	Male	Application for leave to appeal the sentence re: Possession for the purpose of trafficking oxycodone and crack cocaine	Appeal allowed; 3 years' incarceration for crack cocaine; 2 years' oxycodone; served concurrently	Crack cocaine as more dangerous and harmful than powder cocaine Highly addictive[b,c] Harm to society[b,c] Attractive to youth[b] ""I know I've ruined many families whose parents were buying drugs instead of taking care of their children's needs"	Sentences imposed are the product of an error in principle; failure to express remorse was treated as an aggravating factor Denunciation and deterrence Gravity Parity Presence of young child Rehabilitation	Greed Cruelly addictive narcotic[b] Corrosive to the social fabric[b] "potential to destroy many lives, not only of those who consume it, but also of their families and of those who may fall victim of crimes committed by users who seek to feed their addiction"
R v Castelein, 2018 MJ No 57, 2018 MBQB 37	Female 33	Possession for the purpose of trafficking methamphetamine; simple possession of ecstasy, cocaine, and psilocybin	2 years' less a day incarceration	Harm of methamphetamine was recognized when Parliament re-categorized it to Schedule I	Exceptional circumstances Rehabilitation "deterrence and denunciation can be accomplished by a jail sentence that allows the parental relationship to continue"	Destructive drug

R v Clunis, 2018 OJ No 1627, 2018 ONCJ 194	Male (young)	Possession for the purpose of trafficking cocaine	15 months' incarceration; followed by 30 months' probation	Very harmful "What if you were walking along the street and you came upon an elderly person who had fallen and hurt herself. Would you hit her? Would you steal her purse? I don't think you would. I don't think you would because you know it's wrong to take advantage of people who are weak, people who are vulnerable. But that is exactly what you do when you sell addictive drugs. Addiction is a sickness. Drug addicts are weakened by their addiction, they are vulnerable, they are not able to protect themselves because the addiction makes them crave what you have to sell. When you sell them drugs, you prey on that weakness the same way you would if you stole the purse of the old lady who couldn't protect herself" "drug distribution offences are violent offences" Drug dealers may be the target of violence and "arm themselves"; "this creates a society that is less safe and one that creates danger	Conditional sentencing: "I dare say that many judges wonder why it has taken so long for a government that said it would undo many of the sentencing restrictions that were enacted by the previous government. I cannot say that those judges are wrong. However, the legitimacy of our democratic structure depends on legislators legislating and on judges judging. Judges doing end runs around Parliament is toxic to democracy. It undermines democratic institutions and it undermines the legitimacy of the judiciary" Specific and general deterrence	"Drug addicts typically can't afford to pay for their drugs from legitimate sources so they commit crimes to get the money to buy drugs. They break into people's houses and cars. They rob people on the street or in shops or pharmacies. They may sell their bodies and engage in high-risk behaviour just to get money to feed their habit. People get hurt" "tremendous harm done to society as a result of that cavalcade of commuter cocaine dealers"

				not just for addicts, users and dealers but also for people who have nothing to do with the use of drugs. One day those innocent victims could easily be your mum or your sisters. People get hurt"		
R v Ethier, 2018 OJ No 913, 2018 ONSC 1200	2 Males 48, 51	Conspiracy to traffic cocaine; Trafficking cocaine Jones: Possession of marijuana; producing marijuana	5 years' incarceration	"directly and indirectly harming individuals and families" "inherent harm to society"	Denunciation and Specific and general deterrence Parity	-
R v J.S., 2018 NJ 290	Male 49	Possession for the purpose of trafficking cocaine and cannabis resin	1 year incarceration; followed by 1 year probation	Cocaine resulting in greater harm to society than marihuana[b]	Moral culpability Childhood sexual abuse as a mitigating factor Indigenous heritage Deterrence Rehabilitation	-
R v Jablonski, 2018 OJ 6950	Male 47	Trafficking cocaine; Possession for the purpose of trafficking cocaine and carfentanyl	8 years' incarceration	Cocaine and carfentanyl as "very dangerous" Fentanyl - High lethality[b] - Risk for toxicity and death[b] - Potent[b] - Increasing mortality rates[b] - Unprecedented public health crisis from "sale of illicit drugs" [b] Therapeutic uses under medical supervision[b]	Degree of responsibility; moral blameworthiness General deterrence Denunciation Specific deterrence Rehabilitation Those "who traffic in significant amounts of fentanyl should expect to receive significant penitentiary sentences"	Insidious Scourge Epidemic Abhorrence "a cancer to society" "serious dangers to the life of our society" "imperishable harm to society" Entrenched[b] "Every day in our communities, fentanyl abuse claims the lives of Canadians"[b]

						"Fentanyl is killing young people"[b]
R v Lynn, 2018 BCJ No 6848, 2018 BCSC 2183	Female 36	Possession for the purposes of trafficking cocaine; Possession of carfentanil, heroin, and fentanyl (also a firearms charge)	9 months' incarceration; followed by 1 year probation for drug-related offences	Harmful effects Health crisis	Gravity Moral blameworthiness Exceptional circumstances	"wreak destruction" to individuals and our communities[b] "potential of human misery and violence"[b]
R v Sonnenberg, 2018 BCJ No 7018, 2018 BCPC 347	Male 24	Possession for the purpose of trafficking heroin	6 month imprisonment	"grave harm" harm to community	"contribute to respect for the law and the maintenance of a just, peaceful and safe society" Denunciation – condemnation and punishment for conduct encroaching on community's basic values Deterrence - to discourage this offender and other potential offenders from committing offences in the future, through the fear of punishment Rehabilitation - "can sometimes be the best protection the community has"	-
R v Wall, 2018 BCSC 1643	Male 60	Possession for the purpose of trafficking marijuana and cocaine	Suspended sentence and 30 months probation for possession for cocaine	"acknowledgement of harm to society"	Since charge, acquired medical prospection for cannabis Few "self-protective instincts"	-

			Suspended sentence and concurrent 6 months probation for marihuana		"contributing member of society" "he is self supporting and will have real difficulty maintaining his employment and his residence and animals and equipment if he is sent to jail"	
R c Nelson, 2019 QJ No 4931, 2019 QCCQ 3534	Male 34	Possession for the purpose of trafficking cocaine	6 months incarceration; 3 years probation (incl. abstaining from substance use)	Social and economic harm[b] Use and sale of cocaine kills and harms[b] Adverse health effects[b] Inevitably associated with violent crime[b] "serious damage to our social structure"[b] Highly addictive Highly destructive	Moral blameworthiness Seriousness of the offence General deterrence and denunciation Specific deterrence "the time has come for this Court to give warning to all those greedy persons who deal in the supply and distribution of the narcotic cocaine that more severe penalties will be imposed even when relatively small amounts of the drug are involved"[b] "'mere' cocaine in its powder form still remains a pernicious drug and will accordingly still attract harsh sentences" "One can only hope that his sentence will sensitize him to the	Reprehensible Pernicious "a poison that threatens the fabric of our society" Social condemnation Abhorrence "Plaie social" [trans. Social plague] "calamity" "a scourge in our society" "scourge and devastation" "onslaught" "spawns a web of criminal activity" Profitable "preying on users' addiction and misery" "community-altering drugs" "deleterious substance" Financial self-interest

					plight of his actions on those stricken with addiction and will motivate him to direct his efforts to more fruitful – and legitimate – endeavours in the future"	
R v Chesshire, 2019 BCJ No 2315, 2019 BCSC 2070	Male 20[a]	Trafficking in fentanyl	9 months' incarceration; followed by 2 years' probation	Risks of accidental overdosing[b] Unpredictably potent[b] Unknowingly cut into other drugs[b]	Rehabilitation Denunciation General deterrence "the drugs were delivered to users [friends] who suffered potentially fatal overdoses"	Scourge
R v Choi, 2019 BCJ No 2398, 2019 BCPC 295 (Re: Choi)	Female Male 23 (21[a])	Possession for the purpose of trafficking a mixture of heroin and fentanyl	1.5 years' incarceration; followed by 1 year probation	Addiction Violence Murders Criminal behaviour Overdose deaths[c]	Moral culpability Exceptional circumstances "a seller of illegal drugs assumes a risk that the composition of the drugs is unknown and may contain fentanyl"[b] Deterrence: "a deterrent message must be sent to others so they are not tempted to come here and import the misery of addiction" Denunciation	Plague Greed "spreading the misery of addiction" Scourge "unfortunate addicts" "wilfully blind" "travelled here to spread the plague of illicit hard drugs" "motivated solely by greed"
R v Etmanskie, 2019 NSJ No 548, 2019 NSPC 74	Male 30	Trafficking and possession for the purpose of trafficking cocaine;	Custodial disposition 155-65 remand credit=90 days intermittent s.	Highly addictive drug Attractive to youth[b] Foster theft, robbery, and Embezzlement[b]	Denunciation Societal protection Rehabilitation General and specific deterrence: "I do not	Evil trade[b] Greed[b] Despicable[b] "retailer of poison"[b]

		Attempting to produce crack cocaine	5(2), 90 days concurrent S.463/7(1); 3 years' probation	Results in people who are exposed becoming involved in the drug trade[b] Victims are youth and other vulnerable members of society, their families and friend[b] "consequences to society in both human and financial terms"[b] "consumers lose all dignity and ability" to abstain[b]	think should be sacrificed on the altar of general and specific deterrence and forgo any possible hope of rehabilitation" "systemic and background factors affecting African Nova Scotians" "Counsel argues … the Court does not need to find exceptional circumstances to impose a sentence that does not attract a federal term of imprisonment"	"destroys lives and breeds crime"[b] "immensely profitable crime of premeditation"[b] Cruelly addictive[b] "corrosive to the social fabric"[b] Deadly and devastating[b] Ravages lives[b]
R v Friesen, 2019 BCJ No 1186, 2019 BCSC 1038	Male 38	Trafficking in fentanyl	202 days' incarceration; followed by 2 years' probation	"Staggering" number of opioid related overdose deaths in Canada[c] 73% of accidental apparent opioid-related deaths involved fentanyl or fentanyl-related substances[c] Health crisis Fentanyl epidemic "feels sick that his actions could have harmed someone" 100 times more powerful than morphine[b,c] Produces better "high" than heroin[b,c] Addictive[b,c] Causes dependence[b,c]	Exceptional circumstances (satisfied) Denunciation Deterrence Instilling responsibility Recovery and rehabilitation: "miraculous transformation since his arrest"	"street level trafficker" "more than a nasty drug" "scourge plaguing" "destruction it has wrought" "insidious killer"[b] "notorious Grim Reaper stalking the streets"[b] Greed "iron grip" Devastating Grim statistics Extremely dangerous[b,c] "primitive and negligent mixing methods"[b,c]

				Pharmacological effects: of fentanyl include pain relief, euphoria, sedation, respiratory depression, lowered blood pressure, lowered heart rate[b,c] Death generally a result of respiratory depression[b,c] Unpredictable potency[b,c] Imprecise mixing methods[b,c] "most vulnerable members of our communities—the homeless, drug-addicted, and impoverished—are disproportionately represented in these grim statistics of death and addiction" "tragedy and misery felt by the family and friends"[b] "extremely hazardous substance" Risk of harm to first responders, healthcare workers, citizens wielding naloxone kits through contamination[b] Serious public health crisis[b] Used medically by anesthesiologists[b,c]		Grim reality
R v Hulshof, 2019 BCJ No	Male 41	Possession for the purpose of trafficking fentanyl, a mixture of	2 years' incarceration for	Fentanyl epidemic High number of fentanyl-related deaths[c]	Denunciation and deterrence	Scourge Devastating impact

706, 2019 BCSC 638		cocaine and Fentanyl, and a mixture of heroin and fentanyl	drug-related charges	"the potential harm caused by trafficking in fentanyl, or other illicit drugs mixed with fentanyl, is unprecedented" "There is no evidence that anyone died from the fentanyl sold by this offender" "even tiny amounts of fentanyl mixed into other drugs such as cocaine or heroin may be fatal" Recognized risk of harm or death to others	"the need to impose individual responsibility upon dealers given those risks and the public knowledge of them" Rehabilitation Exceptional circumstances	"harm caused by the illicit trafficking of fentanyl is catastrophic to the social fabric of our society"
R v Khan, 2019 BCJ No 2415 2019 BCPC 300	Male 19[a]	Trafficking (also assault with a weapon; robbery)	14 months' incarceration for drug related offence; 1.5 years' probation	"harm that his actions could have on the community" Potentially lethal effects "intolerable risks of accidental overdosing"[b] More potent than morphine[b] Unpredictably potent[b] Small amounts of fentanyl mixed with other drugs can be fatal[b] Unpredictable whether other street drugs have fentanyl cut into them[b] "physical dangers that arrive in the drug-trafficking world" "deadly drug"	Protection of the public General seriousness Rehabilitation Extraordinary circumstances "a short stint in custody now will give him one last quick but meaningful reminder that life choices that result in jail terms are to be avoided in the future"	Scourge[b] Pernicious
R v Khosravi, 2019 BCJ No	Male 31, 28[a]	Possession for the purposes of trafficking cocaine	10 months' incarceration	Economic and health consequences for society	Denunciation General deterrence Proportionality	Sophistication "commerciality"

601, 2019 BCSC 509					Totality principle	
R v Kielt, 2019 BCSC 2458	Female 53	Trafficking heroin and fentanyl	1.5 years' incarceration	"risk of significant harm or death in the community" Deadly	Sentencing ranges	
R v Morrison, 2019 NSJ No 409, 2019 NSPC 38	Male	Possession for the purpose of trafficking cocaine	8 months' incarceration; followed by 1 year probation	Health risks to users Harm to a user's family Negative impacts in the workplace Risk for drugs to be share beyond purchasers "It is not possible for traffickers to circumscribe the resulting harm"	Denunciation Deterrence "tendency towards mercy must be tempered by recognition of the harmful effects of the accused's behavior"	Destructive effects "wracked by drug abuse" "Drug abuse has to potential to ruin lives, destroy families, and damage the community. It can turn healthy people into sick and needy people. It can turn an honest person into a habitual liar. A user's life goals shrink to one short-sighted objective – to get that next 'bump'. The hard and important problems of life are cast aside in favour of the easy quick fix"[b] "retailer of poison" "destroys lives and breeds crime"[b]
R v Noseworthy, 2019 NLSC 23	Male	Conspiracy to traffic in cocaine and marijuana	30 months incarceration; 1 year probation	Serious public safety issues	Gravity Rehabilitation	Greed
R v Shallow, 2019 OJ No 131, 2019 ONSC 403	Male 21 (18[a])	Possession for the purpose of trafficking cocaine	90 days incarceration, served intermittently	"potential to cause a great deal of harm to individuals and to society"	Exceptional circumstances (satisfied) "acknowledgment of the harm which criminal	Dangerous and insidious[b]

			Fridays 6:00 p.m. until Mondays 7:00 a.m.; 36 months' probation		activity brings to our community" Large amount of quantity of crack cocaine Youthful offender A 15-month sentence would "seriously jeopardize his rehabilitation," require him to leave college, and negatively impact his fiancé Probation sufficient for specific deterrence Lengthy probation is sufficiently punitive for general deterrence	
R v Ursino and Dracea, 2019 OJ No 1083, 2019 ONSC 1171	2 Males	Various charges related to conspiracy to import cocaine and trafficking cocaine	Ursino: 12.5 years' incarceration Dracea: 10 years' incarceration	"use and sale of cocaine kills and harms both directly and indirectly"[b] "direct adverse health effects on those who use the drug are enormous and disastrous"[b] "Cocaine sale and use is closely and strongly associated with violent crime"[b] "Cocaine importation begets a multiplicity of violent acts"[b] "conduct which inevitably follows the importation"[b] "inevitable consequences"[b] "Cocaine destroys people"[b]	Denunciation and general deterrence "to discourage other like-minded greedy persons from attempting to bring illegal drugs into this country"[b] "must not receive a harsher sentence for pleading not guilty and having a trial. That was their right."	Greed "blight on society" "two or more persons working together can achieve evil results that would be impossible for an individual working alone"[b] "the scale of injury that might be caused to the fabric of society can be far greater when two or more persons conspire to commit a crime than when an individual sets out alone"[b]

						"dreadful toll on society" "grief and misery"[b] Ravages[b] "prepared to do significant damage to others so that they could make money"[b] "a merchant of destruction and death"[b]
R v Brown, 2020 NLSC 103	Male 30[a]	Conspiracy to traffic cocaine involving large commercial venture involving importation and trafficking	44 months' incarceration	'Hard' drug that results in greater harm to society Fuels organized crime Destroys lives Widespread victims; some are the "most vulnerable members of our society including those with severe addictions"[b] Social damage: "... families destroyed, children removed from addict parents, addicts living in deplorable conditions, crimes (sometimes violent) committed to fund the habit, suppliers using violence to enforce payment"	"cocaine trafficking is a blight on society and every effort must be made to eradicate it. This is why cocaine trafficking warrants heavy sentences for offenders"[b] General deterrence Protection of the public Rehabilitation, secondary	Blight on society "preys upon the addiction of others for profit leaving in its wake inestimable individual and social damage and desolation"[b] Dark truth[b]
R v Richard Quast, 2020 OJ No 5056, 2020 ONSC 6870	Male 24	Trafficking fentanyl and cocaine	5 years' incarceration	Dangerous and deadly "primarily sold to the young and the most vulnerable" Use "rapidly increasing"	Denunciation General and specific deterrence Gravity Protection of society Rehabilitation	Accused "preyed on the weak and the vulnerable with his toxic wares"

				Underlies "many of the crimes in our community and many of our social issues"	Moral blameworthiness Exceptional circumstances (satisfied)	
R v White, 2020 NSJ No 131, 2020 NSCA 33, 387 CCC (3d) 106	Male 38	Possession for the purpose of trafficking fentanyl, cocaine, and crack cocaine	8 years' incarceration for fentanyl conviction; five years for cocaine conviction; to be served concurrently	Health and safety Overdose[b] High abuse potential[c] Death Unknowing consumption when labelled and sold as other drugs[b] Use "leads many users to crime and prostitution"[b] Risk for unintentional exposure by police and first responders	Contribute to respect for the law Maintain just, peaceful, and safe society Encourage rehabilitation and treatment Acknowledge harm done to victims and communities Gravity of the offence (this was "among the largest seizures prosecuted in Canada") Parity Dangerousness of the drug Moral blameworthiness [92] "The primary objective being the protection of society requires severe punishment that will expressly denounce such conduct, and deter not only the offender, but any others who may be similarly inclined."[b]	Greed Ravages[b] Scourge[b] "visiting crime, violence, affliction and misfortune upon our urban and rural communities"[b] "profit from the misery of others"[b] Tragic epidemic[b] Twin evils[b] "undermining the health of his community while pretending to be a responsible and supportive member of it"[b]
R v Bank, 2021 AJ No 818, 2021 ABCA 223, 2021 CarswellAlta	2 Males	Trafficking in a controlled substance	Dismissed	Unlawful drugs often cause severe and prolonged harm to those who use them and their families	Law of entrapment Integrity of the judicial process Need for law and order and fair police practices	-

1438, 2021 11 WWR 657, 175 WCB (2d) 128, 31 Alta LR (7th) 1, 406 CCC (3d) 329				"Certain crimes, such as, for example, selling drugs or weapons, do not, as a general rule, produce immediate victims"[b] "enormously damaging to the fabric and wellbeing of society"[b] "often severely damaging to the lives of many young people"[b]		
R v Campbell, 2021 BCJ No 971, 2021 BCSC 853	Male 29 (26[a])	Possession for the purpose of trafficking fentanyl, cocaine, methamphetamine	2 years' incarceration; 3 years' probation	High rates of opioid-related death, particularly fentanyl[c] Pharmacological effects of fentanyl include pain relief, euphoria, sedation, respiratory depression, lowered blood pressure and lowered heart rate; cause of death generally respiratory depression[b] "risk of overdose death is heightened with fentanyl because of its potency and because traffickers typically use imprecise mixing methods" [b] Potency varies widely[b] Extremely dangerous[b] Lethal[b] "tragedy and misery felt by the family and friends of the deceased"[b] Danger to first responders, healthcare workers, citizens wielding naloxone	Rehabilitation Denunciation Deterrence Indigenous heritage Impact on the community Moral blameworthiness Exceptional circumstances (satisfied) "Mr. Campbell must be sentenced for his criminal conduct and must not be made a scapegoat for all harms caused by fentanyl" "vengeance, a concept often confused with retribution, plays no role in the criminal justice system"	Scourge of deaths[b] Scourge of fentanyl[b] Pernicious[b] Plaguing communities[b] Iron grip[b] Destruction wrought on the community[b] Insidious killer[b] "notorious Grim Reaper stalking the streets"[b] Insidious[b] Nasty drug[b] Misery[b] "primitive and negligent mixing methods" [b,d]

				kits and more through risk of contamination[b] "collateral toll on a strapped healthcare system struggling to respond to this epidemic"[b]		
R v Gill, 2021 BCPC 351	Male	Trafficking cocaine fentanyl mix; Possession of fentanyl and a mixture of fentanyl and carfentanil	5 years' incarceration	Carfentanil as more 'deadly' than fentanyl "We, of course, can never know if the drugs you sold would have killed anybody. As far as we are aware, the drugs you sold and had in your possession were confiscated by the police; however, it is no doubt in my mind that the amount of drugs you had, in most likelihood would have caused harm to members of our society"	Denunciation General and specific deterrence "Each time a drug user uses drugs it is, in effect, a game of Russian roulette because they do not know the toxicity level of the fentanyl and therefore drug dealers, as I say, should be put into jail in most cases"	Greed "wanted money to buy luxury items" "greed for fancy possessions"
R v Howard, 2021 BCJ No 1478, 2021 BCPC 167	Female 38	Possession for the purpose of trafficking heroin, fentanyl and cocaine	22 months' conditional sentence order	"told police that she did not sell fentanyl because a friend had died from an overdose… She was unaware of anyone overdosing on fentanyl who had purchased drugs from the line she worked for" "devastating effect the opioid crisis" Illicit drug toxicity deaths Human lives put at risk[b] Fentanyl as far more likely to cause lethal overdose	Proportionality Gravity Degree of responsibility Denunciation and deterrence Rehabilitation Moral blameworthiness Safety of the community	"toll in human misery and lives lost" Evils[b] Profit as motive[b]

				Increased risk of overdose and death when fentanyl is masked as OxyContin[b] Dangerous drugs		
R v Milne, 2021 BCSC 1859	Male 24	Trafficking fentanyl and ketamine	1.5 years' incarceration	"injury on the community" Drug toxicity deaths[c] Crisis Lethality[d] Fentanyl as more potent than heroin (more likely to cause depression of breathing and sedation)[d] Lethal dose of fentanyl is unpredictable and variable[d] Can cause devastating brain damage[d] Epidemic	Denunciation and deterrence Gravity Degree of responsibility Exceptional circumstances	Insidious "plight of the addicted"
R v Parranto, 2021 SCJ No 46, 2021 SCC 46, 2021 ACS no 46, 75 CR (7th) 217, EYB 2021-418889, 2021EXP-2759, 2021 CarswellAlta 2846, 2022 1 WWR 1, 31 Alta LR (7th) 213, 411 CCC (3d) 1, 463 DLR (4th) 389	2 Males	Trafficking fentanyl at the wholesale commercial level (also firearms charges)	Appeal dismissed Felix: 10 years' incarceration Parranto: 14 years' incarceration	Addiction Debilitating adverse health effects Death by overdose Increase in crime Violent crime Impact on families Intergenerational trauma Health care and law enforcement costs Lost productivity Fentanyl - Highly addictive - Risk of serious harm greater than other opioids - National crisis - Epidemic	"Proportionality is the organizing principle in reaching this goal [of a 'fair, fit and principled sanction'], and parity and individualization are secondary principles Gravity: - "Appellate courts must sometimes set a new direction that reflects a contemporary understanding of the gravity of the offence"; - "The time has come for the perception of the gravity of largescale trafficking in fentanyl to accord	"preys disproportionally on the misery of others" Callous disregard "untold grief and suffering it leaves in its wake" "crime that kills — often and indiscriminately" "prey on the vulnerable"[b] "profit from the misery of the Canadian public" "personal gain" "source of unspeakable harm"

				Composition and dangers of drugs may change "objective harm caused by outsiders who engage in wholesale fentanyl trafficking to vulnerable communities may amount to an aggravating circumstance" "Children suffer immense harm from the effects of addiction in their home"; pre-natal impact; physical and/or emotional violence in the homes that they should be safe in; "The future of these children and their families is damaged and all of society pays the price"[b] Cost of opioid and cocaine "abuse" in Canada estimated at $9.6 billion[c] Higher risk than cocaine and heroin Extremely dangerous Potent High risk for overdose, particularly among "naïve users" or in interaction with alcohol or other drugs Danger when fentanyl is surreptitiously mixed with other substances[c] "carfentanil, is so toxic that it "has no safe or beneficial human use, even	with the gravity of the crisis it has caused" - "Substantial sentences should be neither unusual nor reserved for exceptional circumstances, and maximum sentences should not be reserved for the abstract case of the worst crime committed in the worst circumstances. Sentencing judges should feel justified, where circumstances warrant, in applying mid-level double digit sentences and, in particularly aggravating circumstances, potential sentences of life imprisonment" Selection of comparator cases Gladue factors Aggravating and mitigating circumstances Degree of responsibility Moral blameworthiness "starting point" approach Parity Denunciation and deterrence Rehabilitation	"greed and the pursuit of profit at the expense of violence, death, and the perpetuation of a public health crisis" "the most efficient killer of drug users on the market today" "destroy lives" "undermine the very foundations of our society" "As an outsider, he chose to traffic drugs to those vulnerable communities for easy money" "predatory conduct" "easy money to be made off the addiction of others"[b] "devastating consequences" "plagued by addiction" "death, destruction, and havoc" "those who oversee the distribution of these drugs are personally 'responsible for the gradual but inexorable degeneration of many

				within the medical community in highly controlled environments"[c] Physical and mental injury "already strained resources of the health care system must respond to the physical and mental injury sustained by users"[b] Powerful painkiller and sedative "When taken outside of controlled medical environments, puts its users at risk of serious harm, including brain damage, organ damage, coma, and death"		of their fellow human beings'"[b] "ruinous consequences" Those who use "destroy themselves and others" Families "torn apart"[b] "grievous consequences"[b] "tears at the very fabric of society"[b] "grave threat" "public enemy number one" "deceptive practice" of mixing into other drugs "it is a crime marked by greed and the pursuit of profit at the expense of violence, death, and the perpetuation of a public health crisis previously unseen in Canadian society" ""[t]rafficking in fentanyl is almost the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette"[b] "most efficient killer of drug users on the market today"[b]

						Undermines the "very foundations of our society"
R v Simmonds, 2021 NSJ No 71, 2021 NSSC 54	Male 39	Possession for the purposes of trafficking crack cocaine and cannabis	2 years' incarceration, followed by 3 years' probation with rehabilitative conditions	Dangerous substance[b] Highly addictive Incredibly destructive	Denunciation and deterrence: "If the respondent knows that he can continue trafficking in a dangerous substance like cocaine and then receive no more than a two year sentence, there will be no incentive to change his ways"[b] "severity of a sentence should match the dangerousness of the drug involved"[b] "Society's condemnation may be reflected in longer terms of imprisonment, which have a deterrent effect both on the offender and on all those who might be tempted to imitate the offender."[b] Restorative justice: "Crime generally affects at least three parties: the victim, the community, and the offender … This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim	Ravages[b] Scourge[b] "visiting crime, violence, affliction and misfortune upon our urban and rural communities" "profit from the misery of others" Greedy persons "far-reaching and poisonous tentacles of crack cocaine" "horrible drug"

					and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims "[b] Impact of race and culture: "These factors operate, not as an excuse or justification for criminal conduct, but rather as context for the sentencing judge to determine an appropriate sentence. They do not create a race-based discount in sentencing and do not mandate remedying over-representation by artificially reducing incarceration rates"[b] Sad life principle: Premised on the principle of restraint; "considered in cases where the offender has demonstrated a genuine interest in rehabilitation"[b]	
R v Szucs, 2021 BCJ No 1616,	5 Males	Conspiracy to traffic fentanyl, cocaine,	10 years' imprisonment	Fentanyl: overdose, death	Accepted joint submission	Greed

2021 BCSC 1441		methamphetamine, and/or heroin			Plead guilty, accepting "responsibility" "potential to contribute to society instead of harming it"	
R v Truax, 2021 AJ No 379, 2021 ABCA 97, 2021 7 WWR 381, 20 Alta LR (7th) 1, 2021 CarswellAlta 637	Female	Several charges relate to: Conspiring to import methamphetamine Possession for the purpose of trafficking methamphetamine Smuggling methamphetamine	6 years' incarceration	"extensive societal harm"[b]	Deterrence and denunciation Protection of the public Methamphetamine has a four and one-half years sentence starting point for wholesale trafficking Importation is a more serious offence than trafficking Requirement to impose consecutive sentence imposed for criminal organization offence	Dangerous and insidious[b] Devastating[b] Greed
R v Webber, 2021 BCJ No 2692, 2021 BCPC 296	Male 33	Possession for the purpose of trafficking cocaine and methamphetamine	15 month conditional sentence	Hid drugs in public location, which could have been found by children	Contrition; remorsefulness; no "ongoing threat to the community" Denunciation and deterrence "must be paramount" Exceptional circumstances Jail sentence would pose financial hardship on the accused's family, leaving them "less able to participate productively in society"	Insidious Reprehensible
R c Cobb, 2022 QJ No 7537,	Male 29 (26[a])	Possession for the purpose of trafficking crack cocaine,	3 years' incarceration for	Immense social and economic harm[b] Kills and harms[b]	Denunciation Deterrence	Corrosive Insidious Pernicious

2022 QCCQ 5171		powder cocaine, and cannabis Firearms possession	drug-related charges	"adverse health effects on those who use the drug are enormous and disastrous"[b] Associated with violent crime and "inevitable consequences"[b] "creating an overwhelming and almost immediate addiction in the user"[b] Crack viewed as crack more addictive and dangerous than powder cocaine[b] "potential to cause a great deal of harm to individuals and to society"[b] Highly addictive Highly destructive	"send a clear communication to Mr. Cobb and other like-minded individuals that drug dealers will not be allowed to … distribute their toxic wares in our communities. The message must be unequivocal" "the sentencing process must be wary of rewarding adult men for not staying home, doing nothing and playing video games or similarly, for not being engaged in criminal activity…. the lack of an aggravating factor does not transform itself into a mitigating factor"	Abhorrence Greedy persons Social condemnation "he should have been working" Scourge to society Toxic Volatile "No one today can claim to be so naïve as to think that trafficking in cocaine can be conducted without serious damage to our social structure"[b] "tears the social fabric"[b] "insensitive drug dealers"[b] "cruelly addictive narcotic" "spawns a web of criminal activity" "leaves its users' lives in tatters" Very profitable "preying on users' addiction and misery" "Crack cocaine is a highly destructive, addictive social poison"
R v Aeichele, 2022 BCJ No 233, 2022 BCSC 195	Female 43 Male 36	Possession of methamphetamine, cocaine, and fentanyl	Aeichele: 1.5 years' conditional sentence	Direct and indirect harms to society Addiction	Safety to the community Risk of reoffending "conditional sentence orders can be tailored to	"a scourge to society" "death, destruction, havoc in our communities"

		for the purpose of trafficking	Knauff: 30 months' incarceration	Debilitating adverse health consequences Death Leads to other crimes "increased crime, gangs of criminals, violence, shootings, death of innocent victims who are caught in the crossfire" Destroys people's lives Impacts families "breathtakingly high costs to society"	provide elements of denunciation and deterrence"[b]	
R v Dymkowski, 2022 ONSC 6821	Male	Possession for the purpose of trafficking cocaine, fentanyl, and methamphetamine,	9 years' incarceration	Direct and indirect harms to society "beyond its mere potential to cause harm however, fentanyl has had and continues to have, a real and deadly impact on the lives of Canadians"[b] National crisis	Gravity Proportionality	Insidious "death, destruction [and] havoc it causes in communities across Canada"[b]
R v Ellis, 2022 BCJ No 1509, 2022 BCCA 278, 2022 WCB 1356, 417 CCC (3d) 102, 82 CR (7th) 223, 2022 CarswellBC 2224	Female 41[a]	Trafficking and possession for the purpose of trafficking fentanyl	Suspended sentence; 3 years' probation	Addiction[b,d] Motivated to support their habit, resorting to violence, committing break and enters and theft and prostitution[b,d] Unemployment[b,d] Loss of family[b,d] Overdose death[c] Realistic potential for accidental and fatal overdose	Gravity Moral blameworthiness Deterrence Rehabilitation Protection of the public Restorative approach Proportionality Exceptional circumstances: "The Crown is correct: a judge does not need to find 'exceptional circumstances' or, importantly, revisit or reconsider a sentencing	Outrage[b] Scourge[b] Fentanyl is "dangerous, it is ubiquitous and people are dying because of it"[b]

					range based on a material change in societal attitude to depart from it" From VANDU's perspective, "[h]arshly punishing these individuals for a crisis that claims them as its victims is perverse" "criminalizing drug use really does nothing but drive harm, including increasing overdose risks, while really not producing positive outcomes for people"[b,d] "very expensive to incarcerate people and associated funds could likely go a long way to funding the types of evidence- based programs that could reduce these harms"[b,d] "in isolation, jail sentences and the involvement of the criminal justice system has not been effective in stemming the flood of fentanyl in the drug supply"[b,d]	
R v Gilker, 2022 NBJ No	Female 23	Conspiring to traffic methamphetamine;	4 years' incarceration	Devastating effects "on society in general and on those who fall victim[b]	Denunciation General deterrence	Nefarious[b] Destroying our communities

346, 2022 NBKB 247		Conspiring to traffic cocaine; Possession for the purpose of trafficking cannabis		Highly addictive[b] Crack cocaine as more dangerous and harmful than powder cocaine[b] Harm to society[b] Methamphetamine similarly addictive and destructive as crack cocaine[b] "society's more relaxed attitude towards the use of cannabis"		"creating terrible suffering for addicts"
R v Harmes, 2022 BCSC 663	Male	Possession for the purpose of trafficking methamphetamine, cocaine, fentanyl, ketamine, codeine, hydromorphone, morphine (alongside other charges)	12 years' incarceration for drug-related charges	Addiction[b] Debilitating health effects[b] Death by overdose[b] Increased crime "from those seeking to finance their addiction and those seeking to maintain control over the lucrative drug trade" [b] Impacts the families of those with drug addictions[b] Societal costs in terms of health care and law enforcement[b] Fentanyl (and analogue) harms worse that heroin, cocaine, and methamphetamine[b] Public state of emergency: "opioid pandemic" and overdose-related deaths[b] Opioid epidemic[b] High rates of illicit drug toxicity deaths[c]	Deterrence Denunciation Public protection Proportionality Parity Rehabilitation Gravity Degree of responsibility Moral culpability	Greed Profitable "callous disregard for the untold grief and suffering it leaves in its wake" Despicable crime Devastating Fentanyl scourge[b] Pernicious "preys disproportionally on the misery of others" "prey on the vulnerable"[b] "profit from the misery of the Canadian public for personal gain"[b] "destroy lives and wreak social havoc" "easiest way for him to attain the lifestyle he desired"

				“a source of unspeakable harm”[b] Fentanyl as more potent than morphine heroin[b] Analogues like carfentanil as more potent than fentanyl[b]		“grave threat to the community”[b] Fentanyl as “public enemy number one”[b] “willingness to exploit at-risk populations and communities”[b] “reckless disregard for human life”[b] “destroy lives and wreak social havoc”[b] Crown: “the worst possible offender” “preys disproportionally on the misery of others”[b] “Callous disregard for the untold grief and suffering it leaves in its wake”[b] “a crime that kills -- often and indiscriminately”[b] “source of unspeakable harm”[b] “merchants of misery”[b] “customers' addictions as a ‘road to riches’”[b] “new and more deadly heights”[b] “current public health crisis is “a crime that preys

						disproportionally on the misery of others"[b]
R v Kim, 2022 BCSC 518	Male 27	Possession for the purpose of trafficking heroin, fentanyl, an analogue of fentanyl (cyclopropyl fentanyl), a derivative of fentanyl (4-Anilino-Nphenethylpiperideine), carfentanil, cocaine, methamphetamine, alprazolam, and cannabis (marihuana) (also firearms offences)	10 years' incarceration	Addiction Debilitating health effects Overdose/drug toxicity deaths[c] Increased crime Impacts families of those with drug addictions Societal health care and law enforcement costs Potency of analogues or derivatives of fentanyl exacerbate risks[b] "carfentanil, is so toxic that it 'has no safe or beneficial human use, even within the medical community in highly controlled environments'"[b] "a source of unspeakable harm"[b] Opioid crisis Public health crisis	Gravity Deterrence Denunciation Public Protection Blameworthiness "those are the consequences of his poor choices" "your actions have jeopardized the opportunity you may have to become involved in your young children's lives"	Greed[b] Callous disregard[b] "untold grief and suffering it leaves in its wake"[b] "preys disproportionally on the misery of others"[b] "prey on the vulnerable"[b] "profit from the misery of the Canadian public[b] Scourge[b] Lucrative "grave threat to the community" Fentanyl as "public enemy number one"[b] "willingness to exploit at-risk populations and communities"[b] "reckless disregard for human life"[b] "destroy lives and wreak social havoc"[b] "merchants of misery"[b] Addictions "road to riches"[b] "capable of obtaining legitimate employment … he

						opted for quick, easy money" "an informed choice to engage in the distribution of devastatingly harmful drugs for pure profit" "profit was generated by preying on the vulnerable and addicted" "grim death toll"[b] "playing Russian roulette"[b] "most efficient killer of drug users on the market today"[b] "disregard for the lives and safety of others"
R v Mazerolle, 2022 NBJ No 34, 2022 AN-B. no 342022 NBQB 38	Male 40	Possession for the purpose of trafficking methamphetamine; possession of hydromorphcontin (as well as weapons related charges)	5.5 years' incarceration for drug related charges	Addictive Dangerous "the human toll addiction … causes to individuals and their families" "Regularly, family court child protection orders in this district for either temporary custody or guardianship interrupt or extinguish, respectively, parental rights and are issued due to parental addiction to methamphetamine and other types of hard drugs" Adverse health effects[b]	Denunciation and deterrence Proportionality "With hard drug use and addiction washing through communities across Canada, it was timely for the Supreme Court to send a powerful message to trial judges across this country directing them in R v Parranto, 2021 SCC 46 (S.C.C.) to depart from prior sentencing precedents in circumstances that no	Scourge[b] Wreckage "cruelly addictive"[b] "corrosive to [our] social fabric"[b] "potential to destroy many lives" including those who consume, families, and those who "fall victim of crimes committed by users who seek to feed their addiction"[b] Profit[b] "death, destruction, and havoc"[b]

				Death by overdose[b] Increase in crime[b] Violence[b] Intergenerational trauma[b] Pre-natal impact[b] Physical and/or emotional violence in the home where children "should be safe][b] "children whose parents abuse drugs are at an increased risk of physical abuse, emotional abuse, and neglect"[b,c] Health care and law enforcement expenses[b] Lost productivity[b] Cost of opioid and cocaine "abuse" in Canada estimated at $9.6 billion[b,c] "methamphetamine poses as serious a risk as cocaine" "dangerously cheap to buy"	longer reflect society's contemporary understanding of the gravity of a particular offence and the blameworthiness of particular offenders"	"personally "responsible for the gradual but inexorable degeneration of many of their fellow human beings"[b] "ruinous consequences"[b] Families "torn apart"[b] "all of society pays the price"[b] "grievous consequences"[b] "tears at the very fabric of society"[b] Pervasive "sad reality … Never before has such societal disablement and deconstruction been seen or experienced here due to hard drug addiction" "ability to takeover an addicted person's lifestyle and world" "crippling hard drugs"
R v Mitchell, 2022 BCJ No 2560, 2022 BCSC 2321	Female 38	Possession for the purpose of trafficking cocaine, fentanyl, and methamphetamine	3 years' incarceration	Addiction[b] Debilitating adverse health effects[b] Death by overdose[b] Increase in crime[b] Violence[b] Intergenerational trauma[b]	Presentence report Gladue report Deterrence and denunciation "There is no evidence before me to indicate that	Scourge "ruinous consequences"[b] Families "torn apart"[b] "all of society pays the price"[b]

				Pre-natal impact[b] Physical and/or emotional violence in the home where children "should be safe][b] Health care and law enforcement costs[b] Lost productivity[b] "children whose parents abuse drugs are at an increased risk of physical abuse, emotional abuse, and neglect"[b,c]	any of the drugs Ms. Mitchell was involved in selling and making available to the street-level dealers contributed to any of those deaths. That is not the point that I seek to make … at the time Ms. Mitchell was doing this there were people dying in this community. They are not just statistics. They are individuals. They are brothers, mothers, sons, fathers, whatever the case may be, who, for whatever reason, were using drugs and died because they were made available. They are a consequence of drug trafficking activity, such as Ms. Mitchell's"	"grievous consequences"[b] "tears at the very fabric of society"[b] Grave threat[b] "public enemy number one"[b]
R v Oduro, 2022 OJ No 954, 2022 ONSC 530	Male	Possession of cocaine	6 months conditional sentence	When purchasing and using cocaine, participated in that illegal economy, and contributed to direct and indirect harms Burden on community resources such as hospitals and the police; Risks posed to others when someone is operating under the influence of cocaine, such as while driving	Impact on victim and/or community Denunciation General deterrence	Insidious

				Danger posed by concealment of dangerous drugs in a family home Addictive Dangerous Potential to harm or kill		
R c Martinez, 2023 QJ No 73, 2023 QCCQ 15	Female 46	Conspiracy to traffic heroin with a criminal organization (involving 10 individuals)	30 months' incarceration	Addiction[b] Debilitating adverse health effects[b] Death by overdose[b] Increase in crime[b] Inevitable violence[b] Intergenerational trauma[b] "Children suffer immense harm from the effects of addiction in their home"; pre-natal impact; physical and/or emotional violence in the homes that they should be safe in; "The future of these children and their families is damaged and all of society pays the price"[b] Health care and law enforcement expenses[b] Lost productivity[b]	"to express society's condemnation of this type of activity, while considering the particular circumstances of this offender"	Pernicious "ruinous consequences"[b] "destroy themselves and others"[b] Devastation Families can be torn apart; "loss of the individual to the addiction"[b]

APPENDIX D: Summary of Cases Reviewed Pertaining to all other Substances

[a] Age at time of offence
[b] Citing another case
[c] Citing a secondary source
[d] Expert witness

Case (by year)	Sex and age	Drug-related issue	Sentence	Types of harms	Primary sentencing considerations	Moralization language; moral judgment
R v Maruska, 1981 CanLII 3299 (QC CS)	4 Males 37, 52, 43, 21 (20[a])	Conspiracy to traffic and trafficking phencyclidine (PCP)	Maruska: 16 years Grabowski: 15 years Thomas: 13 years DiSalvo: 8 years	"one has generally heard [PCP] described as being a 'lethal poison', 'worse than heroin', etc. However, one must separate fact from fancy" Effects "depend upon the dose taken, the psychological predisposition of the user, and various socio-cultural factors"[c] Effects of moderate dose. comparable to moderate consumption of alcohol[c] May cause visual and auditory hallucinations[c] May cause or induce psychosis among those with predispositions [c] "Like all general anaesthetics, an overdose of P.C.P. is poisonous to the human organism"[c] Overdose deaths caused by or related to "not the most	Deterrence Rehabilitation Protection of society	Greed "substantial operation" "if the manufacturing, distribution and use of P.C.P. is allowed to flourish in Quebec, in addition to the human misery and agony which this would entail, there would also be the cost factor to society in setting up and operating treatment facilities for P.C.P. addicts, which facilities do not now exist"

				valid measurement of the harm to society"; overdose deaths "occur even more frequently in connection with various perfectly lawful substances, such as sleeping pills and tranquillizers, and … innocuous aspirin" "victims" generally under 20 years of age Not physically addictive[c] PCP as less powerful than LSD, but more dangerous "it is my considered opinion that, in the heirarchy of the drugs of abuse, the ranking [according to] relative degrees of lethality is, in descending order: A. the opiates (morphine, heroin and their various derivates); B. phencyclidine; C. cocaine, with P.C.P. being closer in dangerousness to the opiates than it is to cocaine" [Note: more lengthy discussions about harms of other illicit and regulated drugs provided in the case]		
RJR-MacDonald Inc. v. Canada	n/a	To determine whether the Tobacco Products Control Act's	Decision: The legislation was validly enacted	Principal cause of deadly cancers, heart disease and lung disease	Charter issues: Infringement Section 1	"underlying 'evil' of tobacco use"

(Attorney General),1995 SCR 199		prohibition on advertising/promotion of tobacco products and the sale of a tobacco product unless packaging includes health warnings and a list of toxic constituents infringes on s. 2(b) of the Charter	under the criminal law power Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ: "Parliament's decision to criminalize tobacco advertisement and promotion is a valid exercise of the criminal law power"	Tobacco is highly addictive Consumption is most widespread among the most vulnerable, the young and the less educated, at whom much of the advertising is specifically directed		"the evil tobacco works generally in our society" Profit motive "sole purpose is to promote the use of a product that is harmful and often fatal to the consumer by sophisticated advertising campaigns often specifically aimed at the young and most vulnerable"
R v Rosales, 2001 CanLII 21315	Male 26	Importing ecstasy (N-methyl-3, 4 methylenedioxy-amphetamine	30 months incarceration; 1 year probation	Targets young people Harmful effects:[b,d] Fatalities, "tension, flight of ideas, anxiety, paranoia, hallucinations and delirium. In severe cases, panic attacks and acute toxic psychosis can occur…. Increased heart rate and blood pressure, muscle tension...blurred vision, nausea and insomnia; higher doses can cause brain damage; serious psychiatric problems include impaired memory and 'executive functions', impulsivity, panic attacks, psychotic episodes, and severe	"not simply the crass pursuit of pecuniary gain" "denunciation and deterrence are primordial objectives" "send a clear message to importers and to those who hire them"	Personal profit "the purely mercantile motivation of the offender"[b]

				depression; toxicity of the liver, serious irregularities of heart rhythm, brain hemorrhaging, stupor and convulsions caused by dehydration during rave parties, and destruction of muscle cells, blood clotting and kidney or liver damage due to elevated body temperature; of the 87 reported fatalities, 14 were also due to accidents or suicide "the "intrinsic toxicity of these drugs is probably greater than that of the opiates"[b,d] "this drug is not as harmful as heroin or cocaine" "also used by young adults and others for the comradeship, sensuality and heightened awareness that it induces"		
R v Ahmed, 2007 CarswellOnt 7357	Male	Attempting to bring khat into the country	Absolute discharge	Khat was brought in for the accused's wedding: "the tradition in his culture apparently being to provide each guest with a bundle of leaves" "no clear evidence of harm" Heavy use of khat and sudden withdrawal may have some negative	"The criminalization of [khat] affects only a visible minority, the north-eastern African immigrants for whom it is to some extent a cultural tradition" "harm to others as generally a prerequisite to punishment and it is hard to know what the basis for punishment is if	-

				physical and behavioural effects on some users No evidence to support contentions that khat is "a 'gateway drug' and that some of the proceeds may go back to terrorists in the Middle East"	there is no identifiable harm to other people"	
R v Moore, 2009 BCJ No 2880, 2009 BCSC 1926, 2009 CarswellBC 3900, 94 WCB (2d) 189	Male 35	Trafficking cannabis, ecstasy, and anabolic steroids	4 years' incarceration	"Drug trafficking and possession contribute to physical assaults in custody centres"[d] Risks to Correctional Officers and inmates Associated risk of physical assaults and violence[d] Overdose deaths[d] Riots[d] Noted that the reported cited here may not relate to the drugs in this case Jeopardizes safety and security[d] "All members of a prison society are harmed by trafficking in drugs"	Denunciation Deterrence Rehabilitation "The sentence should strongly denounce and deter, but not crush the spirit of the convicted person or be so unduly long that it may impede his rehabilitation" Incarceration as "a window of opportunity, an intervention to interrupt the cycle of addiction"[d]	Pernicious
R v Kwok, 2015 BCJ No 137, 2015 BCCA 34, 2015 CarswellBC 172, 120 WCB (2d) 610, 320 CCC (3d) 212, 366 BCAC 228	3 Males 42, 62, 62	Kwok and Ng: Importation; Possession for the purpose of trafficking ketamine Mr. Lau: Possession for the purposes of trafficking	Kwok and Ng: 12 years' incarceration Lau: 6 years' incarceration	"the accused argued that the sentencing judge overstated the harmfulness of ketamine" Judge found "sufficient evidence to establish the use of ketamine as a harmful drug" Legally used as a non-barbiturate anaesthetic in humans and animals	Judge reviewed evidence submitted and found "sufficient evidence to establish the use of ketamine as a harmful drug"	-

				In rare circumstances, prolonged use can exacerbate pre-existing mental illness, schizophrenia, and cause relapses in hallucinations; Not physiologically addictive Few deaths associated with ketamine[c] Frequently used with other drugs, such as alcohol, GHB and MDMA, elevating seriousness of the effects[c] Few instances when ketamine user has remained in a 'catatonic' state[c] Has been used as a 'date rape' drug[c] Other harmful 'cutting' drugs, including MDMA, were found with the ketamine Use increasing, predominately among young people		
R v McArthur, 2016 BCJ No 1520, 2016 BCPC 464	Male 27, (24[a])	Possession for the purpose of trafficking N-Methyl-3, 4-methylenedioxy-amphetamine (MDMA; ecstasy)	Suspended sentence; 2 years' probation	Harmful "[The defense] point to the unsophisticated nature of his trafficking efforts and the nature of the drug itself, arguing - as some of the cases say - the mistaken belief that ecstasy is a recreational	Deterrence Denunciation "A suspended sentence can achieve a deterrent [… and] denunciatory effect… the stigma of being a convicted drug trafficker and the consequences of that	Pernicious "merchants of misery" "profit from the misery of others" Greed

				drug and less addictive or harmful than cocaine or heroin. I say that because to my understanding at least one person a week dies from the use of ecstasy in North America"	conviction—for example, restricted ability to travel outside of Canada and exclusion from many forms of employment— may also play a deterrent effect"[b] Exceptional circumstances Protecting the public	
R v Vickerson, 2016 BCJ No 1448, 2016 BCPC 204	Male 29	Possession for the purpose of trafficking cocaine, MDMA, BZP and TFMPP, and THC	12 months incarceration for cocaine, MDMA, BZP and TFMPP, served concurrently 30 days incarceration for THC, served concurrently	No harms mentioned. Accused argued: "There are too many bad people dealing drugs and the drug game needs a couple of nice people." "All drugs should be legalized and regulated" "The drug war should be ended"	Citing Voong: "Those who embark in drug trafficking engage in serious criminal conduct. Absent exceptional circumstances, in British Columbia, they should expect to be sent to prison" ranging from 6-18 months[b]	-
R v Sentes, 2017 BCJ No 333, 2017 BCSC 290	Male 24	Possession for the purpose of trafficking MDMA and GHB	Suspended sentence; 2 years' probation	"a particularly odious aspect of this sort of trade: it tempts people away from legitimate lifestyles because there is so much money to be made" "serious public health crisis brought on by drug trafficking"	Parity Gravity of the offence Rehabilitation: "his rehabilitation comes close to rivalling the requirement of denunciation and deterrence" "People who profit by this trade must be punished" "The best guarantee of public safety and security over the long haul is for drug addicts to be cured of their addictions and to	"lucrative, hard to detect, easy to operate enterprises" Pernicious "pedalled, often by predators and profiteers, to some of our most vulnerable and unfortunate citizens" "highly deleterious impact of this activity" "profoundly anti-social commerce"

					be set firmly on the path of law-abiding citizenship" "to punish and deter this offender without compromising his rehabilitation"	
R v Carswell, 2018 SJ No 73, 2018 SKQB 53, 409 CRR (2d) 205	Female 27	Trafficking in N-methyl-3, 4-methyl enedioxy methamphetamine	2 years' incarceration	MDMA is in Schedule I, where Parliament has listed the most "harmful drugs" Harm caused by availability of illicit drugs inside a penitentiary:[d] - violence to inmates, sometimes with weapons, typically arising from unpaid drug-related debts - requests for segregation by inmates who fear violence, detriment to mental health and potential need to transfer to other institutions, with the consequence that they no longer are close to family and friends - spread of communicable disease, resulting from the sharing of needles - drug reactions leading to serious harm or the death - harm to staff arising from violence among	Deterrence and denunciation	Grave concern[b]

				inmates and arising from the availability of needles		
R v Manhas, 2019 BCJ No 1462, 2019 BCSC 1293	Female 49	Conspiracy to export MDMA	Suspended sentence with 3 years' probation	"she now realizes that her actions helped exploit people who are sick from addiction" Importing and exporting "cause or threaten significant harm to the community" "dangerous, illicit drugs" "very significant harm caused to so many people from the illicit use of Schedule I drugs"	Gravity Moral blameworthiness Danger to society Parity Restraint Denunciation and deterrence Proportionality Rehabilitation Exceptional circumstances (satisfied)	-

APPENDIX E: Summary of Cases Reviewed Pertaining to Drug-Related Health and Social Services and Organizations

[a] Age at time of offence
[b] Citing another case
[c] Citing a secondary source
[d] Expert witness

Case (by year)	Sex and age of accused/ appellant	Drug-related issue	Sentence	Types of harms	Intended sentencing outcomes	Moralization language; moral judgment
Attorney General of Canada v. PHS Community Services Society, 2011 SCC 44	n/a	Constitutional exemption for Insite	The appeal and the cross-appeal are dismissed" The Minister of Health was ordered to grant an exemption to Insite under s. 56 of the *CDSA*	Ss. 4(1) and 5(1) of the *CDSA* are "concerned with suppressing the availability of drugs that have harmful effects on human health"[c] "protection of public health and safety from the effects of addictive drugs is a valid criminal law purpose" "The claimants argue that the prohibition on possession of illegal drugs in s. 4(1) of the *CDSA* is not in accordance with the principles of fundamental justice because it is arbitrary, disproportionate in its effects, and overbroad. They say it is arbitrary because, when applied to Insite, it is not only inconsistent with the	"relationship between the state interest and the impugned law or, in this case, the impugned decision of the Minister"	-

				goals of the *CDSA*, but undermines them. They submit that it is disproportionate in its effects, as it causes significant harm to the clients of Insite and those like them, while providing no commensurate benefit. And they assert that it is overbroad because its application to Insite is unnecessary to meet the state's objectives" State objective as per *Malmo-Levine*: "criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers"[b]		
Providence Health Care Society v Canada (Attorney General), 2014 BCJ No 1058, 2014 BCSC 936	n/a	Injunction relief	Interlocutory injunction granted	Heroin - significant harms Diacetylmorphine (active component of heroin) "can be pharmaceutically produced without the impurities associated with street drugs" Not allowing diacetylmorphine to be available would pose "irreparable harm faced by	Serious question to be tried Irreparable harm Balance of convenience	-

				persons with severe opioid addiction" Opioid Use Disorder associated with:[d] - health and community concerns - compulsive drug-seeking behaviour - infectious diseases and related risk behaviors - fatal overdose - drug acquisition crime - "the highly profitable and often violent illegal drug market which is believed to be largely controlled by organized crime groups - Disproportionately high mortality rates "injectable diacetylmorphine is a much safer option than supervised use of oral or injectable hydromorphone for patients"[c,d] Illicit drugs represented as heroin may include other dangerous substances and/or adulterants; potency is unknown[d] Diacetylmorphine: - high rate of life-threatening events - may cause cerebral hypoxia post-injection		

				- worse on cognitive tests than patients on methadone or buprenorphine - IV administration more likely to cause intoxication, respiratory depression and hypoxia (lack of oxygen) than oral - respiratory depression - interactions with benzodiazepines and alcohol - non-fatal overdoses cause trauma, aspiration, and cognitive damage		